

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

JANUARY TERM, 1932.

No. 5602

140

UNION GUARDIAN TRUST COMPANY, EXECUTOR
OF THE ESTATE OF JOSEPH L. SELLING, DEC'D,
APPELLANT,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE

APPEAL FROM THE BOARD OF TAX APPEALS.

FILED FEBRUARY 2, 1932.

PRINTED MARCH 17, 1932.

Court of Appeals of the District of Columbia

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Court of Appeals of the District of Columbia

No. 5602.

UNION GUARDIAN TRUST COMPANY, Executor of the Estate
of Joseph L. Selling, Dec'd, Appellant,

vs.

DAVID BURNET, Commissioner of Internal Revenue.

1 Docket No. 31384.

JOSEPH L. SELLING (Amended by Order of 9/22/31 to read:
Estate of J. L. Selling, Dec'd, Union Guardian Trust
Co., Executor), Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Appearances:

For Petitioner: Arnold R. Baar, Esq., A. R. Foss, Esq.
For Respondent: Hartford Allen, Esq.

Docket Entries.

1927.

Sept. 21. Petition received and filed. Taxpayer notified.
(Fee paid.)

Sept. 23. Copy of petition served on General Counsel.

Nov. 21. Answer filed by General Counsel.

Nov. 22. Copy served on taxpayer—General Calendar.

1929.

Sept. 5. Motion to transfer to the Detroit, Michigan, cir-
cuit calendar filed by taxpayer. 9/7/29
granted.

1930.

Apr. 19. Hearing set June 3, 1930 at Detroit, Michigan.

June 3. Hearing had before Mr. Van Fossan (9). Motion
to amend granted. Petitioner's brief due in 60
days.

1930.

- July 9. Transcript of hearing 6/2/30 filed.
 July 28. Motion for extension of 60 days to file brief filed
 by taxpayer. 7/29/30 granted.
 Sept. 29. Brief filed by taxpayer.

1931.

- Mar. 25. Findings of fact and opinion rendered—Mr. Van
 Fossan, Division 9. Decision will be entered
 for Commissioner.
 Mar. 27. Decision entered—Mr. Van Fossan, Division 9.
 Sept. 21. Motion to substitute Union Guardian Trust Com-
 pany, Executor, as petitioner and to vacate
 final order filed by taxpayer.
 Sept. 22. Order substituting Union Guardian Trust Com-
 pany as executor of the Estate of Joseph L.
 Selling entered.
 Sept. 22. Order vacating decision of Mar. 27, 1931 entered.
 Sept. 24. Decision entered—Mr. Van Fossan, Division 9.
 Sept. 25. Stipulation of venue filed.
 Sept. 25. Petition for review by Court of Appeals of D. C.,
 with assignments of error filed by taxpayer.
 Sept. 25. Proof of service filed.
 Nov. 24. Motion to extend time to 1/23/32 to prepare and
 transmit record filed by taxpayer.
 2 Nov. 24. Order enlarging time to Jan. 23, 1932 for
 preparation and delivery of record entered.

1932.

- Jan. 20. Stipulation for enlarging time to 2/23/32 for
 preparation of evidence and delivery of record
 filed.
 Jan. 21. Agreed statement of evidence lodged.
 Jan. 21. Præcipe filed—proof of service thereon.
 Jan. 21. Order enlarging time to Feb. 23, 1932 for prepa-
 ration of evidence and transmission and de-
 livery of record entered.
 Jan. 22. Agreed statement of evidence approved and or-
 dered filed.

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Filed Sept. 21, 1927.

Petition as Amended.

(Words underscored printed in italic) were added by
 amendment allowed at the hearing, June 3, 1930, and it

was ordered that the answer of the respondent be extended to generally deny the matters added by the amendments.)

United States Board of Tax Appeals.

Docket No. 31384.

JOSEPH L. SELLING, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Petition.

The above named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:PA-PYA-60D-WSL) dated July 25, 1927, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual residing at the Whittier Hotel, Detroit, Michigan.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on July 25, 1927.

3. The taxes in controversy are income taxes for the calendar year 1922 amounting to *more than* \$6,161.59.

4. The determination of the tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in determining that the petitioner was an employee of rather than a partner *or joint proprietor* with the Straus Land Corporation, Ltd., of Detroit, Michigan, during the year 1922.

(b) The Commissioner erred in determining that \$50,420.76 received in settlement with the Straus Land Corporation, Ltd., was taxable income for the year 1922.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner alleges on information and belief that during the calendar year 1922 and for many years prior thereto, to-wit, since January 1, 1916, he and the Straus Land Corporation, Ltd., of Detroit, Michigan, were
4 associated under agreement as co-partners *or as co-owners* in the business of buying and selling real estate with their principal place of business in Detroit,

Michigan. The petitioner's share of the annual profits of the business was 50% of the first \$10,000, 40% of the second \$10,000, 25% of the third \$10,000, and 15% of all over \$30,000. Under this agreement the petitioner was to bear any annual losses on the same basis and in the same proportion as provided for his share of the net profits.

(b) During 1922 the said business earned no profits and suffered no losses. During this year the said co-partnership *or as co-proprietorship* wound up their business and made distribution of the assets thereof, the petitioner receiving \$50,420.76 as his proper share of the annual net profits accumulated by credits to his account since January 1, 1916. No part of said share of \$50,420.76 was income earned and/or received by the said co-partnership *or co-proprietorship* during 1922.

Wherefore, the petitioner prays that this Board may hear the proceeding and redetermine that there is no deficiency in income tax due from this petitioner for the year 1922 and if there is any refund due to determine the amount of said refund.

ARNOLD R. BAAR,
ARNOLD R. BAAR,
ARTHUR R. FOSS,
ARTHUR R. FOSS,
Counsel for Petitioner,
231 S. LaSalle St., Chicago, Illinois.

STATE OF ILLINOIS,
County of Cook, ss:

Joseph L. Selling, hereby duly sworn, says that he is the petitioner above named; that he has read the foregoing petition, and is familiar with the statements contained therein and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

JOSEPH L. SELLING.

Subscribed and sworn to before me this 15th day of September, A. D. 1927.

[SEAL.]

W. A. GIFFEN,
Notary Public.

My commission expires March 5, 1929.

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EXHIBIT A.

Form NP-2.

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

IT:PA-PYA-60D. WSL.

Jul. 25, 1927.

Mr. Joseph L. Selling,
General Necessities Building,
Detroit, Michigan.

SIR:

The determination of your income tax liability for the years 1922 and 1923 as set forth in office letter dated January 8, 1927, disclosed a deficiency in tax for 1922 amounting to \$6,161.59, and an overassessment amounting to \$303.78 for 1923, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the

Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA-PYA-60D-WSL. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner,

By C. R. NASH,
Assistant to the Commissioner.

Inclosures: Statement, Form A, Form 882.

6 *Statement.*

IT:PA:PYA-60D. WSL.

Jul. 25, 1927.

In re Mr. Joseph L. Selling, General Necessities Building,
Detroit, Michigan.

Years.	Deficiency in tax.	Over- assessment.
1922 (Waiver).....	\$6,161.59	
1923		\$303.78

The audit was made in connection with the report of the Internal Revenue Agent in Charge at Detroit, Michigan, dated August 29, 1926.

Information on file in this office indicates that the services for which the income of \$37,432.55 was received were rendered within the United States. Therefore, the taxes paid thereon to the Canadian Government do not represent a credit against the taxes paid to the United States.

In accordance with Section 222(a)(5) of the Revenue Act of 1921, the amount of credit taken under this subdivision shall not exceed the same proportion of the tax, against which such credit is taken, which the taxpayer's net income (computed without deduction for any income, war profits and excess profits taxes imposed by any foreign country or possession of the United States) from sources without the United States, bears to his entire net income (computed without such deduction) for the same taxable year.

It is further noted that the agent stated in his report that no records were kept and the information was secured

principally from memoranda furnished by you, and further that the foreign taxes were accrued to the Canadian Government in 1922 and paid in 1923.

Since no books were kept on an accrual basis, it is held that the returns were filed on a cash receipts and disbursement basis and, therefore, the taxes paid to the Canadian Government in 1923 were not allowable as a credit against taxes nor as a deduction against income in 1922.

Since the amount of \$6,161.59 was not allowable as a credit against taxes either in 1922 or 1923, it represented an allowable deduction against income for 1923. The disallowance of this amount as a credit in 1922 results in a deficiency in tax in the amount of \$1,161.59 for that year.

The readjustment of your income for 1923, allowing the amount of \$6,161.59 as a deduction, discloses an adjusted net income of \$8,016.53 on which the net tax assessable is \$15.13. Since a net tax of \$318.91 was previously assessed, an overassessment of \$303.78 is disclosed.

The information submitted in your briefs dated February 5, 1927 and February 19, 1927, respectively, and the explanations presented at a conference in this office on March 24, 1927, have been given full consideration.

Relative to your contention that income of \$50,427.06 received by you from the Straus Land Corporation in 1922 represented your share of the profits of a joint venture, and, therefore, should be included in your returns for years prior to 1922 or included in your return for 1921 on the accrual basis, you are advised that in view of the terms of the contract between you and the corporation and the fact that you made your return on the cash receipts and disbursements basis, it has been held by this office that the income in question, which was not available to you until 1922, is taxable for 1922.

The adjustments outlined in office letter to you dated January 8, 1927, have, therefore, been sustained.

The overassessment shown herein will be made the subject of a Certificate of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district. If the tax in question has not been paid, the amount will be abated by the Collector. If the tax has been paid, the amount of overpayment will first be credited against unpaid income tax for

another year or years, and the balance, if any, will be refunded to you by check of the Treasury Department. It will thus be seen that the overassessment does not indicate the amount which will be credited or refunded, since a position may be an assessment which has been entered but not paid.

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district and remittance should then be made to him.

8 Filed Nov. 21, 1927, United States Board of Tax Appeal.

United States Board of Tax Appeals.

Docket No. 31384.

JOSEPH L. SELLING, General Necessities Bldg., Detroit,
Michigan, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Answer.

The respondent, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of this taxpayer, filed September 21, 1927, admits, denies and avers as follows:

1. Admits the statements and allegations contained in introductory paragraph and paragraph No. 1 of the petition filed herein.

2. Admits the allegations contained in paragraph No. 2 of the petition filed herein.

3. Admits the allegations contained in paragraph No. 3 of the petition filed herein.

4. Denies that the respondent erred in determining or computing petitioner's tax liability for the year 1922, as alleged in corresponding paragraph of the petition filed herein.

5. (a) For lack of information denies the allegations contained in corresponding paragraph of the petition filed herein.

5. (b) For lack of information denies the allegations contained in corresponding paragraph of the petition filed herein.

6. Denies generally and specifically each and every allegations not hereinbefore admitted, qualified or denied.

7. Wherefore it is prayed that the relief sought by the petitioner be denied.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

CLARK T. BROWN,
Special Attorney, Bureau of Internal Revenue.

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22 B. T. A. —.

United States Board of Tax Appeals.

Docket No. 31384.

JOSEPH L. SELLING, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Promulgated March 25, 1931.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Held, that a certain contract was a contract of employment and did not create a partnership or relation of co-ownership of an enterprise.

A. R. Foss, Esq., for the petitioner.
Hartford Allen, Esq., for the respondent.

This proceeding is for the redetermination of a deficiency in income tax for the year 1922 amounting to \$6,161.59.

The issue is whether or not certain income received by petitioner under the terms of a contract entered into by him

and the Straus Land Corporation, Limited, is taxable as income for the year 1922.

Findings of Fact.

The petitioner lived in Detroit, Michigan. Prior to 1916 he was engaged in the real estate business on his own account and was familiar with operations in city real estate.

10 Early in 1916 the Straus Land Corporation, Limited, which was incorporated under the laws of the State of Indiana, wishing to associate the petitioner with it in operations in city real estate, began negotiations with him to that end. Two of the three owners of the corporation were relatives of the petitioner and the third was an intimate friend. In the course of the negotiations the petitioner, under date of February 4, 1916, wrote a letter to the vice president of the Straus Land Corporation, Limited, in which, referring to a proposed contract which had been submitted to the petitioner, he said among other things:

The other changes that I have suggested are most of them in line with what I told you when we first broached the proposition, that I would expect to be an executive and not a subordinate. I prefer to have an understanding on this point now rather than later. If I am to share the losses as well as the profits, I must be treated as a partner, and not otherwise.

The negotiations between the Straus Land Corporation, Limited, and the petitioner resulted in a written agreement which was duly executed on February 7, 1916. The articles of agreement numbered 1, 2 and 3 are as follows:

1. Said first party hereby organizes a special department to be known for the purposes of this contract, as its "City Real Estate Department" for the purchase, improvement and sale of and for the purpose of leasing and subleasing of real estate for business and residential purposes in the cities in the State of Michigan only, but said department shall not engage in the purchase or sale of farm lands, and said first party agrees to furnish and advance as capital for the use of said department the sum of One Hundred Thousand Dollars (\$100,000.00), without interest, on or before the 1st day of March, 1916, and to furnish and advance
11 further sums of money as may be needed for the business of said Department from time to time after the

first day of January, 1917, up to one hundred thousand dollars (\$100,000.00), the necessity for and the time at which such additional capital shall be advanced shall be determined by and between the second party hereto and Jerome Ackerman, of Detroit, Michigan, but in any case such additional One Hundred Thousand Dollars (\$100,000.00) shall be advanced before December 31st, 1917. These further sums so advanced shall draw interest at the rate of six percent (6%) per annum, and which advancements shall be known and designated on the books to be kept by said Department as "Straus Land City Real Estate Advancements" and the interest thereon shall be considered and treated as a part of the expenses of said Department in computing the net profits thereof as hereinafter referred to.

Within the limits referred to as to the extent of such Straus Land City Real Estate Advancements for the use of said City Real Estate Department by the first party, it is mutually agreed and understood by and between the parties hereto that the City Real Estate Department shall continuously obtain such money or repay such money as the exigencies and best interests of said City Real Estate Department shall demand interest to be charged on average monthly balances.

For the purpose of mutually defining the scope and nature of the business to be undertaken and conducted by the said City Real Estate Department, it is distinctly understood and agreed by and between the parties hereto that said Department is not organized for the purpose of making loans for commission or buying mortgages or notes or land contracts, nor is any such other business contemplated as would be considered as coming within the scope of an investment business.

2. That for and during the term commencing on the first day of January, 1916, and ending on the first day of January, 1921, the first party agrees to and does hereby employ the said second party and the second party agrees to and does hereby engage his services to the first party in the management and conduct of said City Real Estate Department and agrees to devote his entire time and energies to the conduct of the business of said Department (except such time as may be necessary for the oversight and management of the real estate at the present time owned or

controlled by him or in which he may be financially
12 interested. A memorandum of such interests,
marked "Exhibit A" is attached hereto and made a
part of this contract and which for purposes of further
identification is signed by the second party hereto) in a
competent and efficient manner and to the best interests of
the party of the first part, and the second party agrees
that he will not himself or through any agent or repre-
sentative engage in the business of buying or selling farm-
lands or city property or leaseholds, either for himself or
as agent for another, either directly or indirectly, during
the period covered by this contract, and that he will not
purchase any parcels of real estate for said Department
at a cost exceeding Ten Thousand Dollars (\$10,000.00)
each, without the consent of two Directors of the first party,
and that no purchases shall be made of realty leaseholds
without the consent of one Director of the party of the first
part.

The minimum selling prices on all properties and lease-
holds shall be fixed by agreement between both parties
hereto and no reduction in such minimum selling prices
shall be made without the consent of one Director of the
first party and said second party.

The said party of the second part shall be elected Vice
President and Assistant Secretary of the Straus Land
Corporation, Limited, which office he will hold for the pe-
riod of this contract. All deeds and instruments of con-
veyance must be signed by either the President or a Vice
President and attested by the Secretary or an Assistant
Secretary of the said first party.

The offices of said Department shall be maintained in the
said City of Detroit.

3. The second party shall receive and hereby agrees to
accept in full as a salary for all his services and the first
party hereby agrees to pay him from the net profits of said
Department as a salary, a sum equivalent to fifty per
cent. of the first ten thousand dollars, forty per cent. of
the second ten thousand dollars, twenty-five per cent. of
the third ten thousand, and fifteen per cent, of all over
thirty thousand dollars of the annual net profits earned by
the said City Real Estate Department during the said pe-
riod of five years of this contract and the said second party

shall be responsible for and pay for any loss during any of said years on the same basis and in the same proportions as herein provided for his share of the net profits. Such earnings and losses, if any, shall be adjusted, set up and debited or credited to him on the books of said Department at the end of each year of the period of said contract, but the final settlement and payment thereof to be made only at the termination of this contract.

The fourth article of the agreement provides, among other things, that all notes, mortgages, contracts and real estate acquired in the conduct of the business of the City Real Estate Department should be taken in the name of the Straus Land Corporation, Limited. Article 6 provides, among other things, that

No part of the net earnings of said City Department shall be withdrawn by either party hereto, but the same shall be left in the business of said department without interest until the termination of this contract.

Article 7 provides as follows:

7. At the termination of this contract, or any extended term thereof by mutual agreement, within 60 days thereafter, the assets of said Department shall be distributed as follows:

1. All liabilities to any party incurred by said first party on behalf of said City Real Estate Department shall be first paid, except such liabilities on notes secured by mortgages on real estate acquired or sold or carried on the books of the said City Real Estate Department and contracts for the purchase or sale of Real Estate made on behalf of said corporation by said City Real Estate Department.

2. The first party shall have its choice of the assets of said Department and withdraw the same up to one hundred thousand dollars (\$100,000.00) in full for the repayment of said first one hundred thousand dollars (\$100,000.00) advanced to said Department as working capital, without interest, and also up to the amount of any and all additional advancements made by first party to or for the use of said Department, and credited to the account hereinbefore referred to as "Straus Land

City Real Estate Advancements" with interest as hereinbefore provided, thereon, at the rate of six per cent. per annum on such additional advancements, also any other liabilities incurred for or on behalf of said City Real Estate Department not hereinbefore referred to.

3. The balance of the assets then remaining shall be considered as representing the net profits of said Department and shall be divided pro rata as follows: The second party shall receive a portion of such residue of the then remaining assets equivalent in value to his share of the net profits (less his share of the losses, if any), of the business of said Department and set up on the books of said Department as hereinbefore provided, and the balance of such assets shall be and remain the property of said first party.

The agreement further provides that all of the expenses of the City Real Estate Department, created under the terms of the contract, should be borne by it and that a prorated part of the salary of any employee of the Straus Land Corporation, Limited, who may have furnished part of his services to the City Real Estate Department should be charged against that department. The agreement also contains the following provision:

A separate set of books of account and records shall be kept for the purpose of recording the transactions and results of business of said Department as distinct from those of said first party not connected with said Department.

The contract between the Straus Land Corporation, Limited, and the petitioner was prepared by the vice president of the corporation and was not drafted by a lawyer.

At the date of the execution of the contract petitioner owned property of the net value of approximately \$100,000.

15 Upon the execution of the contract petitioner proceeded to organize the business of the City Real Estate Department and carried it on as if it were his own business. The department kept separate books and maintained a bank account separate from that of the Straus Land Corporation, Limited. In connection with the business of the City Real Estate Department the petitioner,

as vice president and assistant secretary of the Straus Land Corporation, Limited, executed deeds and other necessary instruments and signed checks on the department's separate bank account.

At the end of each year the profits of the business were determined and the petitioner's share therein was credited to him on the books of the City Real Estate Department. The contract between the petitioner and the Straus Land Corporation, Limited, was extended for one year after January 1, 1921, the date fixed by the terms of the contract for its termination. No profits were made during 1922.

In 1921 petitioner received as part of his share of the profit under the contract an interest in a leasehold, such interest being valued at \$9,000. In his income tax return for 1921 petitioner reported the said amount of \$9,000 as income received by him during that year from a partnership. In 1922 petitioner received in cash, notes and a mortgage the sum of \$50,420.76, together with interest on the same from January 1, 1921, which latter date was the date named in the contract for its termination. This sum
16 represented the total balance of petitioner's share in the profits of the City Real Estate Department pursuant to the terms of the contract.

In his income tax return for 1922 petitioner reported the said sum of \$50,420.76 as income from salaries, wages, commissions, etc., received during that year from the Straus Land Corporation, Limited. In the same return petitioner took a credit in the sum of \$6,161.59 on account of taxes paid to the Canadian Government. The respondent disallowed this credit on the ground that although such taxes accrued for 1922 they were not paid until 1923. By reason of such disallowance the respondent determined a deficiency in tax in the sum of \$6,161.59.

The petitioner kept his books on the cash receipts and disbursements basis.

Opinion.

VAN FOSSAN: Petitioner kept his books and made his returns on a cash basis. In 1922 he received as his share of the final liquidation and distribution of profits of the City Real Estate Department of Straus Land Corporation, Limited, under the terms of the contract referred to in our

findings of fact, the sum of \$50,420.76. Petitioner reported the said sum as income from "salaries, wages, commissions, etc.", but now contends this was error. He alleges, in effect, that the contract of February 7, 1916, created a partnership between Straus Land Corporation, Limited, and petitioner and that since the profits of the alleged partnership were determined each year, they were returnable as income in the year in which earned, whether distributed or not.

The determination of the issue thus presented turns largely on the interpretation of the contract. If it was a contract of partnership under the law petitioner's contention is well made;—if a contract of employment, respondent must prevail.

It will scarcely be gainsaid that the contract in question contains provisions lending color to both interpretations. It provided for a sharing of profits and losses. In this it suggests a partnership. But it expressly provides that Straus Land Corporation, Limited, "agrees to and does hereby employ" petitioner, who in turn "agrees to and does engage his services" to the Land Corporation. It further provides that petitioner "shall receive and hereby agrees to accept in full as a salary for all his services", a fixed proportion of the profits. This language strongly suggests a contract of employment.

Counsel for petitioner frankly conceded at the hearing that under the law of Indiana and Michigan a corporation may not be a member of a partnership. That the same thought underlies section 218 (a) of the Revenue Act of 1921 seems clear from its terms. It provides: "That *individuals* carrying on business in partnership shall be liable for income tax only in their *individual* capacity." In *Burk Waggoner Oil Association v. Hopkins*, 269 U. S. 110, 70 L. Ed. 67, the Supreme Court said: "the term 'partnership' as used in these sections obviously refers only to ordinary partnerships." Surely this was not an "ordinary partnership". Thus, it would seem that to hold the relationship between petitioner and Straus Land Corporation to be that of a partnership would require the recognition of a relation forbidden by the State law and not contemplated by the Revenue Act. It would require, moreover, a disregarding of the express terms of

the contract which characterized petitioner as an employee and his compensation as salary. If it be said that this was a special type of partnership, it may well be replied that it was a special type of employment contract.

We are of the opinion that the respondent did not err in interpreting the contract as one of employment and that petitioner properly reported as income for 1922 the sum of \$50,420.76 received by him in that year.

The disallowance by respondent of the credit claimed by petitioner on account of Canadian taxes is not contested in this proceeding.

Reviewed by the Board.

Decision will be entered for the respondent.

19 United States Board of Tax Appeals, Washington.

Docket No. 31384.

JOSEPH L. SELLING, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Decision.

Pursuant to the determination of the Board, as set forth in its report promulgated March 25, 1931, it is

Ordered and decided: That there is a deficiency of \$6,161.59 for the year 1922.

Enter.

Entered Mar. 27, 1931.

(Signed)

ERNEST H. VAN FOSSAN,

Member.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

20 United States Board of Tax Appeals. Filed Sep.
21, 1931.

Before the United States Board of Tax Appeals.

Docket No. 31384.

JOSEPH L. SELLING, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

*Suggestion of Death of Petitioner and Substitution of
Party Petitioner.*

Now comes the Union Guardian Trust Company, as executor of the last will and testament of Joseph L. Selling, deceased, by its attorney, Arthur R. Foss, who was also the attorney for Joseph L. Selling, the petitioner in the above entitled cause, and suggests to the Board that the said petitioner, Joseph L. Selling, died on October 3, 1930, leaving a last will and testament; that it, Union Guardian Trust Company, was duly appointed executor of said last will and testament of said deceased and has qualified and is now acting as said executor, as will further appear from an exemplified copy of the letters testamentary to said Union Guardian Trust Company, attached hereto as Exhibit A and made a part hereof.

It is further suggested that the hearing on the merits of the petition in this cause was held at Detroit, Michigan, on June 2, 1930, which was before the petitioner died, and that the decision of the Board was promulgated March 25, 1931, and the order of deficiency was entered by the Board on March 27, 1931, at which both dates the said petitioner was deceased.

It is further suggested that the Union Guardian Trust Company, as said executor, believes that said decision and order of deficiency are erroneous and contrary to the evidence submitted in the cause and the law applicable
21 thereto and is desirous of having the said actions
by the Board reviewed by the United States Circuit Court of Appeals for the Sixth Circuit; that it has been advised that it may be substituted for said Joseph L. Sell-

ing as the party petitioner; that it has also been advised that since the order of deficiency as now entered is against said Joseph L. Selling and is not against it, the Union Guardian Trust Company as his executor, there is substantial doubt whether it may maintain an appeal to the said Circuit Court for review of said order, and that since said order was entered when Joseph L. Selling was deceased it may be null and void, to the prejudice of the respondent; that it therefore seems advisable in the interest of justice both to the estate of said deceased and to the respondent that the present order of redetermination be vacated and a new order entered after the Union Guardian Trust Company has been made the party petitioner.

It is therefore moved that the Union Guardian Trust Company, as executor of the last will and testament of Joseph L. Selling, deceased, be substituted as petitioner in place of Joseph L. Selling; that the order of deficiency entered on March 27, 1931, be vacated and set aside; and that the Board, following said order of substitution, may thereupon re-enter the order of deficiency, it being understood that the Union Guardian Trust Company as said executor reserves to itself its full rights to seek its reversal as provided by statute.

ARTHUR R. FOSS,
ARTHUR R. FOSS,

Attorney for Union Guardian Trust Company.

22

EXHIBIT A.

Letters Testamentary.

STATE OF MICHIGAN,

County of Wayne, ss:

Probate Court for said County.

164,433.

In the Matter of the Estate of JOSEPH L. SELLING, Deceased.

To Union Guardian Trust Company, of said County, Greeting:

You have been appointed executor of the last will and testament of said deceased duly admitted to probate in

said court, a copy whereof is hereunto annexed, and having given a bond in the premises which has been duly approved and filed as required by law, I do by these presents commit unto you full power and authority to administer and faithfully dispose of, according to the law and the will of said deceased, all and singular the goods, chattels, rights, credits and estate of said deceased, which shall at any time come to your possession, or to the possession of any other person for you, and to ask, gather, levy, recover and receive all of the goods, chattels, credits and estate whatsoever of said deceased, which to him at the time of his death did belong; and to pay and discharge all debts, legacies and charges chargeable on the same, or such dividends thereon as shall be ordered and decreed by said court, hereby requiring you to make and return to said court, within thirty days, a true and perfect inventory of all goods, chattels, rights, credits and real estate of said deceased which shall come to your possession or knowledge, or to the possession of any other person for you, and also to render a just and true account of your administration to said court within one year and at least once in each year thereafter during your administration, and at any other time when required by said court, and to perform all orders and decrees of said court by you to be performed in the premises.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at the City of Detroit, in said County, this seventh day of November, A. D. 1930.

[PROBATE SEAL.]

ERVIN R. PALMER,

Judge of Probate.

23 *Exemplification of Record (Double).*

STATE OF MICHIGAN,

County of Wayne, ss:

Probate Court for said County.

I, Theodore J. Brown, Deputy Probate Register for said County and acting as Clerk of said Probate Court, do hereby certify that I have compared the foregoing copy of Letters Testamentary, in the matter of the estate of Joseph L. Selling, Deceased, with the original record thereof, now remaining in this office, and have found the

same to be a correct transcript therefrom, and of the whole of such original record, and that said Letters Testamentary are in full force and effect, unrevoked and unrescinded, at the date hereof.

In witness whereof I have hereunto set my hand and affixed the Seal of said Probate Court, at Detroit, this thirty-first day of August, A. D. 1931.

[PROBATE SEAL.]

THEODORE J. BROWN,

Deputy Probate Register.

STATE OF MICHIGAN,

County of Wayne, ss:

Probate Court for said County.

I, Ervin R. Palmer, one of the Judges of the Probate Court aforesaid, do hereby certify that Theodore J. Brown, who signed the foregoing Certificate, is Deputy Probate Register for said County, and that the foregoing Exemplification of Record is authenticated in due form.

In witness whereof I have hereunto set my hand and affixed the Seal of said Probate Court, at Detroit, this thirty-first day of August, A. D. 1931.

[PROBATE SEAL.]

ERVIN R. PALMER,

Judge of Probate.

24 United States Board of Tax Appeals.

Docket Number 31384.

JOSEPH L. SELLING, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order.

On suggestion of death of the petitioner, and notice of the appointment of an executor filed in the above-entitled proceeding, it is

Ordered that the Union Guardian Trust Company, Executor of the Estate of Joseph L. Selling, deceased, be and hereby is substituted as the petitioner in this proceeding in the place and stead of Joseph L. Selling, deceased, and that

the appeal shall proceed henceforth under the title of the Union Guardian Trust Company, Executor of the Estate of Joseph L. Selling, deceased, v. Commissioner of Internal Revenue.

(Signed) ERNEST H. VAN FOSSAN,
Member.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Dated Washington, D. C., September 22, 1931.

25 United States Board of Tax Appeals.

Docket No. 31384.

JOSEPH L. SELLING, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order.

On motion of counsel for the petitioner, it is

Ordered that the Decision entered in the above-entitled proceeding on March 27, 1931, be and the same hereby is vacated and set aside.

(Signed) ERNEST H. VAN FOSSAN,
Member.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Dated Washington, D. C., September 22, 1931.

26 United States Board of Tax Appeals, Washington.

Docket No. 31384.

UNION GUARDIAN TRUST COMPANY, Executor Estate of
Joseph L. Selling, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Decision.

Pursuant to the determination of the Board, as set forth in its report promulgated March 25, 1931, it is

Ordered and decided that there is a deficiency of \$6,161.59 for the year 1922.

Enter.

(Signed) ERNEST H. VAN FOSSAN,
Member.

Entered Sep. 24, 1931.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

27 United States Board of Tax Appeals. Filed
Sep. 25, 1931.

United States Board of Tax Appeals.

Docket No. 31384.

UNION GUARDIAN TRUST COMPANY, as Executor of the Last
Will and Testament of Joseph L. Selling, deceased,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Agreement.

This agreement, made this 25th day of September, 1931, under and in pursuance of Section 1002 (d) of the Revenue Act of 1926, by and between the Union Guardian Trust Com-

pany, as executor of the last will and testament of Joseph L. Selling, deceased, a taxpayer, having its principal office and place of business at Detroit, Michigan, and the Commissioner of Internal Revenue;

Whereas the taxpayer is the petitioner in cause number 31384 on the Docket of the United State Board of Tax Appeals wherein the said Board decided that there is a deficiency in income tax for the year 1922 in the sum of \$6,161.59, and the taxpayer is desirous that said adverse decision may be reviewed as provided by statute;

Now, this agreement witnesseth that the said taxpayer and the said Commissioner agree that said decision may be reviewed by the Court of Appeals of the District of Columbia.

In witness whereof the above parties have subscribed their names to these presents.

UNION GUARDIAN TRUST COMPANY,

*As Executor of the Last Will and Testament
of Joseph L. Selling, Deceased.*

By ARTHUR R. FOSS,

His Attorney and Agent.

DAVID BURNET,

Commissioner of Internal Revenue,

By C. M. CHAREST,

28

Filed Sept. 25, 1931.

*Petition for Review of Decision of United States Board of
Tax Appeals in Docket No. 31384.*

Court of Appeals of the District of Columbia.

UNION GUARDIAN TRUST COMPANY, as Executor of the Last
Will and Testament of Joseph L. Selling, Deceased, Ap-
pellant,

v.

COMMISSIONER OF INTERNAL REVENUE, Appellee.

Petition for Review to the Court of Appeals of the District
of Columbia.

To the Honorable Judges of the Court of Appeals of the
District of Columbia:

Now comes Union Guardian Trust Company as executor
of the last will and testament of Joseph L. Selling, De-

ceased, appellant herein, by its attorneys, Arnold R. Baar and Arthur R. Foss, and petitions the Court of Appeals of the District of Columbia for review of the decision of the United States Board of Tax Appeals originally rendered on March 27, 1931, but subsequently vacated and then re-rendered on September 24, 1931, in cause Number 31384 on the Docket of said Board, and in support of its petition respectfully shows this honorable court as follows:

I. Venue and Jurisdiction.

The appellant is a Michigan corporation with its principal office and place of business in Detroit, Michigan, and is executor of the last will and testament of Joseph L. Selling, deceased. The income tax return which is in question was not filed by the appellant but was filed by Joseph L. Selling while an inhabitant of Detroit, Michigan, who has since died. The appellee (hereinafter referred to as Commissioner) is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

29 The Commissioner and the appellant as the taxpayer, in pursuance of Section 1002 (d) of the Revenue Act of 1926, have stipulated by an agreement between them that said decision may be reviewed by the Court of Appeals of the District of Columbia.

This court has jurisdiction to review the said decision of the United States Board of Tax Appeals in this cause, by virtue of the provisions of Sections 1001, 1002 and 1003 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928.

II. Prior Proceedings.

The Commissioner determined the sum of \$6,161.59 as the deficiency in income tax of said Joseph L. Selling for the taxable year 1922. On July 25, 1927, in accordance with the provisions of Section 274 of the Revenue Act of 1926, the Commissioner sent by registered mail to said Joseph L. Selling (hereinafter referred to as the taxpayer) a notice of said deficiency. Thereafter, on September 21, 1927, the taxpayer filed with the United States Board of Tax Appeals his appeal from said notice of deficiency. The hearing of

said appeal by the said Board of Tax Appeals was held on June 2, 1930. On March 25, 1931, the Board promulgated its findings of fact and opinion in said appeal and on March 27, 1931, entered its final order of redetermination in said appeal, wherein and whereby the said Board ordered and decided that there is a deficiency for the said taxable year, in the amount determined by the Commissioner, as aforesaid. Thereafter, it having been suggested to the said Board of Tax Appeals that said Joseph L. Selling had died on October 3, 1930, prior to the entry of said final order, and that the appellant was executor of his last will and testament, the said Board entered its order on September 22, 1931, substituting this appellant as the petitioner in said proceedings, and on September 22, 1931, the Board vacated its said order of March 27, 1931, and on September 24, 1931 entered a final order of redetermination, again ordering and deciding that there is a deficiency for the said taxable year, in the amount determined by the Commissioner, as aforesaid.

III. Nature of the Controversy.

In his income tax return for the year 1922, the taxpayer reported the sum of \$50,420.76 as income from "salaries, wages, commissions, etc." but in the petition to the Board and during the proceedings thereon it was contended, and is now contended, that this was an error. It is contended that said sum was not "salaries, wages, commissions, etc." but that it was instead a share of the profits from a business conducted by said taxpayer and Straus Land Corporation, Ltd. as co-proprietors under a contract between them, and further that it was not received by the taxpayer during the year 1922 but was received prior thereto.

30 The Commissioner held, in determining the deficiency in question, that the taxpayer was an employee under said contract, that the said sum of \$50,420.76 was compensation for services rendered as such employee, that it was received as such in the year 1922, and so was subject to the income tax for said year, and the Board approved of and affirmed said holdings.

The ultimate question presented, therefore, is whether or not the said sum of \$50,420.76 constituted taxable income for the year 1922. The underlying questions are:

(a) Was the taxpayer an employee of or a co-proprietor with the Straus Land Corporation, Limited?

(b) Whether or not he was such employee or co-owner, was said sum of \$50,420.76 taxable as income of the year 1922, or did it represent income of some other period?

IV. Assignment of Errors.

Appellant says that in the record and proceedings before the Board, and in the decision and final order of redetermination rendered and entered by said Board, manifest error occurred and intervened to the prejudice of the taxpayer and his executor, and the appellant assigns the following errors, and each of them, which, it avers, occur in the said record, proceedings, decision, and final order of redetermination so rendered and entered by the Board, to-wit:

(1) The Board erred in holding that the taxpayer received the sum of \$50,420.76 in the year 1922 as compensation for services rendered by him as an employee, in that said holding is contrary to its findings of fact and is contrary to and unsupported by the evidence before the Board.

(2) The Board erred in finding and deciding that the taxpayer was an employee of the Straus Land Corporation, Ltd. in the business conducted under a contract between them dated February 7, 1916, in that such finding and decision are contrary to its findings of fact and contrary to and unsupported by the evidence before the Board.

(3) The Board erred in not finding and deciding that the taxpayer was a co-owner of the business conducted under a contract between him and the Straus Land Corporation, Ltd., dated February 7, 1916, and of the profits derived therefrom.

(4) The Board erred in not finding and deciding that under said contract the interest of the taxpayer in the business and in his share of the profits therefrom was that of a co-owner.

(5) The Board erred in not finding and holding that said sum of \$50,420.76 was received by the taxpayer prior to the year 1922, whether as an employee or as a co-proprietor, and was not subject to any income tax thereon for the year 1922.

31 (6) The Board erred in deciding that there is a deficiency in income tax of \$6,161.59 for the year 1922.

(7) The Board erred in not deciding that there is no deficiency for the year 1922.

(8) The Board erred in not deciding that the tax paid on said sum of \$50,420.76 was erroneous and constitutes an overpayment and in not determining the amount of said overpayment.

V.

Wherefore the appellant petitions that the decision of the United States Board of Tax Appeals be reviewed and reversed by the Court of Appeals of the District of Columbia, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

ARNOLD R. BAAR,
ARNOLD R. BAAR,
ARTHUR R. FOSS,
ARTHUR R. FOSS,
Attorneys for Appellant.

Verification.

STATE OF ILLINOIS,
County of Cook, ss:

Arnold R. Baar, being duly sworn, says that he is one of the above subscribing attorneys for the appellant, and as such is duly authorized to verify the above and foregoing petition for review to the Court of Appeals of the District of Columbia; that he has read said petition for review and is familiar with the statements therein contained and that the facts therein stated are true, to the best of his knowledge and belief.

ARNOLD R. BAAR.
ARNOLD R. BAAR.

Sworn and subscribed to before me this 24th day of September, 1931.

[Seal Loretta J. Gallagher, Cook County, Ill., Notary Public.]

LORETTA J. GALLAGHER,
Notary Public.

My commission expires Dec. 24, 1932.

32 United States Board of Tax Appeals. Filed Sept.
25, 1931.

United States Board of Tax Appeals.

Docket No. 31384.

UNION GUARDIAN TRUST COMPANY, as Executor of the
Estate of Joseph L. Selling, Deceased, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Notice of Filing Petition for Review.

To Commissioner of Internal Revenue,
New Internal Revenue Building,
12th and B Streets N. W.,
Washington, D. C.:

You are hereby notified that the Union Guardian Trust Company, as executor of the last will and testament of Joseph L. Selling, deceased, did on the 25th day of September, 1931, file, with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review, by the Court of Appeals of the District of Columbia, of the decision of the Board heretofore rendered in the above entitled case. A copy of the petition for review and the assignment of errors as filed is hereto attached and served upon you.

Dated this 25th day of September, 1931.

ARTHUR R. FOSS,
ARTHUR R. FOSS,
Attorney for Petitioner.

Personal Service of the above and foregoing notice, together with a copy of the petition for review and assignment of errors mentioned therein, is hereby acknowledged this 25th day of September, 1931.

DAVID BURNET,
Commissioner of Internal Revenue,
By C. M. CHAREST.

Filed Jan. 22, 1932.

United States Board of Tax Appeals.

Docket No. 31384.

UNION GUARDIAN TRUST COMPANY, Executor of the Estate
of Joseph L. Selling, Deceased, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Statement of Evidence.

The above-entitled cause came on for hearing before the Honorable Ernest H. Van Fossan, Member of the United States Board of Tax Appeals, on the 3rd day of June, A. D. 1930, at Detroit, Michigan. A. R. Foss, Esq. appeared for Joseph L. Selling, Petitioner, and Hartford Allen, Esq., for C. M. Charest, General Counsel, Bureau of Internal Revenue, appeared for the Commissioner of Internal Revenue, Respondent.

Joseph L. Selling called as a witness on behalf of the petitioner, after being duly sworn, testified as follows:

Direct examination:

T. 8: My name is Joseph L. Selling, and I reside at 807 Park Avenue Building, Detroit. I am the petitioner in this case. My principal business is real estate.

My principal business in about 1916 and prior to 1916, was real estate. I was in business for myself.

34 I know the corporation known as the Straus Land Corporation, Limited.

T. 9: I had business dealings with it in the early part of 1916. They approached me with a view of my going in with them in the real estate business in the city of Detroit, they being at that time in the business of buying and selling farm lands, and desired, if I went along with them, to go into the city real estate business. I was familiar with city real estate.

The proposition of figures was made by them, but the basis of the proposition was made by me of having a division of the losses in the same proportion as those of the profits; and thereupon they deliberated upon the amounts, and after some negotiations, we found them satisfactory and we entered into this partnership, or joint adventure, whatever it is called.

T. 10: In regard to my purpose in entering into this venture, whether as an employee or as a co-owner, or other relationship, I would not have gone into the venture except as a partner or a co-owner because of the friendly relationships which had existed between us, and I did not wish to go into it with these particular people as an employee.

I knew these people very well. Of the three partners, two were relatives and the other was an intimate friend.

While these negotiations were going on, I made an announcement to them as to what relationship I was contemplating with them. That statement was contained in a letter which I wrote to them sometime during the negotiations. I think it was early in 1916. I have a copy of the letter.

35 (The witness, after examining a document described as a copy of the letter, resumed:)

This copy refreshes my memory as to the exact words I used. The date of the memorandum is February 4, 1916.

By Mr. Foss: Please read the portion that I have referred to as stating your purpose.

T.11: By Mr. Allen: I object to that, your Honor, on the ground that it has not been shown to be a true copy of the letter.

Examination of the witness by the Member:

This memorandum does not purport to be a carbon copy of the letter; it is a copy of the letter. It must have been made from the carbon copy for, of course, I have not the original in my possession, nor, as Mr. Simon J. Straus is deceased, will I be able to get the original letter.

I should have the carbon copy, but I am unable to find it. This copy was sent to Mr. Foss by me. I could not say at what time, but prior—possibly a year or two. I do not

know when Mr. Foss entered into the case. I sent him all the papers which I thought would have any——

I undoubtedly made this copy from the carbon copy. I could not have made it from the original because that was not in my possession.

I made this copy from the carbon copy. I could not make a letter like this from memory. I am prepared to swear, if it makes any difference, that this letter is authentic.

I can state that this is an exact copy of the letter that was written. This memorandum refreshes my recollection as to what I said in that letter so that I have an independent recollection of it after reading the letter. I have a very good recollection of it after reading this.

36 By the Member: The objection is overruled.

By Mr. Allen: I note an exception, your Honor.

T. 13: By Mr. Foss: Read that portion, Mr. Selling, in which you state your desires about the relationship with this Straus Land Corporation.

A. "The other changes that I have suggested are, most of them, in line with what I told you when we first broached this proposition, that I would expect to be an executive and not a subordinate. I prefer to have an understanding on this point now rather than later. If I am to share the losses as well as the profits, I must be treated as a partner and not otherwise."

I know this letter was received because in our negotiations it was referred to.

T. 14: Thereupon the document was received in evidence in support of the witness's testimony as Petitioner's Exhibit No. 1, over the objection of the respondent that the letter had not been properly identified, said exhibit being in words and figures as follows:

37 February 4, 1916.

Mr. Simon J. Straus,
Ligonier, Indiana.

DEAR SIMON:

I have yours of the 2nd. instant, together with copy of the contract from Mr. Barrett, together with your penciled

corrections on same. I desire to call your attention to certain alterations in the amended contract which should be made.

On page #1, paragraph #1, line #11, after \$100,000.00, you will kindly insert the following words:

“Upon demand by second party”

On page #2, second line, you will kindly omit the following words:

“As the first party may direct.”

On page #2, fourth line, after the word “him” kindly insert the following words:

“Or in which he has any interest as a stock holder or otherwise.”

On page #2, ninth line, the paragraph as follows: “That he will not purchase any real estate for such department at a cost exceeding \$10,000.00, without the consent of two directors of the first party;” this should be changed to: “That he will not purchase any parcels of real estate costing more than \$10,000.00 each, without the consent of two directors of the first party.”

On page #2 before the words in the second section of the second paragraph, “The office, etc.” before commencing with “The office, etc.” should be inserted the following:

“That first party agrees that it will execute an irrevocable power of attorney, coupled with an interest to second party, authorizing him to buy and sell real estate, execute and discharge real estate mortgages and land contracts, execute promissory notes, and sign checks for first party upon the bank account of the city real estate department, said power of attorney to run during the life of this contract.”

In the seventh paragraph, second section, seventh line, insert words:

“As herein before provided,” before words “Thereon” and after word “Interest.”

38 The paragraph you have inserted marked “N.B.” stating “When guarantee of payment is referred to herein, it is to be construed as meaning guaranteeing payment as far as principal is concerned within two years after maturity” must be eliminated from this contract. I think the only reason necessary for me to give, is that it was not mentioned to me at any interview.

The other changes that I have suggested are most of them in line with what I told you when we first broached this proposition, that I would expect to be an executive and not a subordinate. I prefer to have an understanding on this point now rather than later. If I am to share the losses as well as the profits, I must be treated as a partner, and not otherwise.

With regards.

Yours truly,

JOSEPH L. SELLING.

JLS.GB.

39 This letter was prior to our final negotiations in which a contract was entered into. We came to a settlement of the terms of the relationship. Our negotiations resulted in a written contract.

T. 15: Thereupon there was received in evidence, without objection, Petitioner's Exhibit No. 2, being a contract dated February 7, 1916, signed by the Straus Land Corporation, Limited, by Simon J. Straus, Vice-President and Max Berendt, Assistant Secretary, and Joseph L. Selling, in words and figures as follows:

40 *Contract.*

This contract executed in duplicate by and between Straus Land Corporation, Limited, a corporation organized and existing under the laws of the State of Indiana, with its principal office in the City of Ligonier, in said State, party of the first part, and Joseph L. Selling, of the City of Detroit, in the state of Michigan, party of the second part, witnesseth:

That in consideration of the several and mutual agreements and conditions on the part of said parties hereto, as hereinafter set out it is hereby agreed as follows:

1. Said first party hereby organizes a special department to be known for the purposes of this contract, as its "City Real Estate Department" for the purchase, improvement and sale of and for the purpose of leasing and subleasing of real estate for business and residential purposes in the cities in the State of Michigan only, but said department shall not engage in the purchase or sale of farm lands, and

said first party agrees to furnish and advance as capital for the use of said department the sum of One Hundred Thousand Dollars (\$100,000.00), without interest on or before the first day of March 1916 and to furnish and advance further sums of money as may be needed for the business of said Department from time to time after the first day of January 1917 up to One Hundred Thousand Dollars (\$100,000.00) the necessity for and the time at which such additional capital shall be advanced shall be determined by and between the second party hereto and Jerome Ackerman, of Detroit, Michigan, but in any case such additional One Hundred Thousand Dollars (\$100,000.00) shall be advanced before December 31st, 1917. These further sums so advanced shall draw interest at the rate of six percent (6%) per annum, and which advancements shall be known and designated on the books to be kept by said Department as "Straus Land City Real Estate Advancements" and the interest thereon shall be considered and treated as a part of the expenses of said Department in computing the net profits thereof as hereinafter referred to.

Within the limits referred to as to the extent of such Straus Land City Real Estate Advancements for the use of said City Real Estate Department by the first party, it is mutually agreed and understood by and between the parties hereto that the City Real Estate Department shall continuously obtain such money or repay such money as the exigencies and best interest of said City Real Estate Department shall demand. Interest to be charged on average monthly balance.

For the purpose of mutually defining the scope and nature of the business to be undertaken and conducted by the said City Real Estate Department, it is distinctly understood and agreed by and between the parties hereto that said Department is not organized for the purpose of making loans for commission or buying mortgages or notes or land contracts, nor is any such other business contemplated as would be considered as coming within the scope of an investment business.

41 2. That for and during the term commencing on the first day of January 1916, and ending on the first day of January 1921, the first party agrees to and does hereby employ the said second party and the second

party agrees to and does hereby engage his services to the first party in the management and conduct of said City Real Estate Department and agrees to devote his entire time and energies to the conduct of the business of said Department (except such time as may be necessary for the oversight and management of the real estate at the present time owned or controlled by him or in which he may be financially interested. A memorandum of such interests, marked "Exhibit A" is attached hereto and made a part of this contract and which for purposes of further identification is signed by the second party hereto) in a competent and efficient manner and to the best interests of the party of the first part, and the second party agrees that he will not himself or through any agent or representative engage in the business of buying or selling farm lands or city property or leaseholds, either for himself or as agent for another, either directly or indirectly, during the period covered by this contract, and that he will not purchase any parcels of real estate for said Department at a cost exceeding Ten Thousand Dollars (\$10,000.00) each, without the consent of two Directors of the first party, and that no purchases shall be made of realty leaseholds without the consent of one Director of the party of the first part.

The minimum selling prices on all properties and leaseholds shall be fixed by agreement between both parties hereto and no reduction in such minimum selling prices shall be made without the consent of one Director of the first party and said second party.

The said party of the second part shall be elected Vice President and Assistant Secretary of the Straus Land Corporation, Limited, which office he will hold for the period of this contract. All deeds and instruments of conveyance must be signed by either the President or a Vice President and attested by the Secretary or an Assistant Secretary of the said first party.

The offices of said Department shall be maintained in the said City of Detroit.

3. The second party shall receive and hereby agrees to accept in full as a salary for all his services and the first party hereby agrees to pay him from the net profits of said Department as a salary, a sum equivalent to fifty per cent of the first ten thousand dollars, forty per cent of the second ten thousand dollars, twenty-five per cent of the third

ten thousand Dollars and fifteen per cent of all over thirty thousand dollars of the annual net profits earned by the said City Real Estate Department during the said period of five years of this contract and the said second party shall be responsible for and pay for any loss during any of said years on the same basis and in the same proportions as herein provided for his share of the net profits. Such earnings and losses, if any, shall be adjusted, set up and debited or credited to him on the books of said Department at the end of each year of the period of said contract, but the final settlement and payment thereof to be made only at the termination of this contract.

42 4. All notes, mortgages, contracts and real estate acquired in the conduct of the business of said City Real Estate Department shall be taken in the name of the first party and shall be inventoried at the end of each year and all such notes, mortgages and contracts shall be valued on the basis of their drawing six per cent interest, that is, if any of such notes, mortgages or contracts shall draw less than six per cent interest per annum, the difference shall be deducted from the face value thereof. All real estate owned by said first party and acquired by the operation of said City Department shall be inventoried at the then actual value thereof, but in no case at more than actual cost.

5. The proportionate cost of unexpired insurance at the end of each fiscal year shall be considered and invoiced as an asset, but advertising, advertising supplies and good will shall not be considered or invoiced as an asset, either in any annual inventory or in the inventory taken at the termination of this contract. Only profits on purchases or sales actually closed shall be invoiced except as otherwise herein provided for at the termination of this contract. All improvement assessments shall be added to the cost of properties as and when paid. All general taxes assessed on property purchased through said City Department and owned by said first party and the proper proportions of the foreign corporation tax paid by said first party to the State of Michigan and of the income tax paid by it to the United States, based upon the earnings of said City Department as compared with the total net earnings of said first party shall be charged to and paid by said City Department as a

part of the expenses of said Department if not paid by such Department at the end of the year in which assessed.

6. No part of the net earnings of said City Department shall be withdrawn by either party hereto, but the same shall be left in the business of said Department without interest until the termination of this contract, at which time if this contract shall not be further extended by mutual agreement, all the assets of said City Real Estate Department shall be invoiced at their actual cash value to be jointly determined and fixed by the second party hereto and by a person selected by said first party, who shall act and be known as appraisers, but in the event that they are unable to agree upon the value of any of such assets, they shall select a third party who, together with them, shall act as appraiser, with authority to determine and fix the value of such properties or assets not so agreed upon by the said second party and the person so selected by said first party, and the decision of said appraisers, or any two of them, as to the values of any such properties or assets shall be final and conclusive upon both parties hereto.

7. At the termination of this contract, or any extended term thereof by mutual agreement, within 60 days thereafter, the assets of said Department shall be distributed as follows:

1. All liabilities to any party incurred by said first party on behalf of said City Real Estate Department shall be first paid, except such liabilities on notes, secured by mortgages on real estate acquired or sold or carried on
43 the books of the said City Real Estate Department and contracts for the purchase or sale of Real Estate made on behalf of said corporation by said City Real Estate Department.

2. The first party shall have its choice of the assets of said Department and withdraw the same up to one hundred thousand dollars (\$100,000.00) in full for the repayment of said first one hundred thousand dollars (\$100,000.00) advanced to said Department as working capital, without interest, and also up to the amount of any and all additional advancements made by first party to or for the use of said department and credited to the account hereinbefore referred to as "Straus Land City Real Estate Advancements" with interest as hereinbefore provided, thereon, at the rate of six per cent, per annum on such addi-

tional advancements, also any other liabilities incurred for or on behalf of said City Real Estate Department not hereinbefore referred to.

3. The balance of the assets then remaining shall be considered as representing the net profits of said Department and shall be divided pro rata as follows: The said second party shall receive a portion of such residue of the then remaining assets equivalent in value to his share of the net profits, (less his share of the losses, if any) of the business of said Department and set up on the books of said Department as hereinbefore provided, and the balance of such assets shall be and remain the property of said first party.

8. In the event, however, that the parties hereto are unable to mutually agree as to the proper pro rata division of such balance of said assets, each party hereto shall choose one person and the two so chosen shall choose a third who, together with the two so first chosen shall act as arbitrators, with authority to and who shall determine and fix the proper pro rata division of such assets on the basis of values heretofore fixed by the appraisers hereinbefore referred to, between the parties hereto in accordance with their respective interests therein, and the decision of said arbitrators, or any two of them, in so doing shall be final and conclusive upon the parties hereto. Such distribution, however, shall be subject to the privilege hereby given to the first party hereto to purchase the pro rata interest of the said second party at the value so agreed upon or so fixed by said appraisers and to pay for the same either in cash or in notes at par and accrued interest secured by first mortgage upon city real estate sold by said first party drawing not less than six percent interest or upon farms sold by said first party drawing not less than five and one-half percent interest and maturing in not exceeding five years from March 1st, 1921, payment guaranteed by either Straus Land Corporation, Limited, or the Straus Brothers Company.

9. There shall be charged to said City Real Estate Department as a part of its expenses to be deducted from its gross earnings, for the purpose of determining its net profits, all its necessary operating and other expenses properly chargeable thereagainst, including a part of the salary of Fifteen Thousand Dollars (\$15,000.00) paid by the first

party to Jerome Ackerman for his general supervision and management of the business of the first party, including said City Real Estate Department, which part of said salary of Fifteen Thousand Dollars (\$15,000.00) shall be computed on a basis of the pro rata proportion which the net earnings of said City Real Estate Department shall bear to the net earnings of Straus Land Corporation, Limited, as a whole, including said City Real Estate Department and before the said salary of Fifteen Thousand Dollars (\$15,000.00) shall have been charged against same, and for the purpose of the distribution of this salary and net earnings of Straus Land Corporation, Limited, shall be arrived at after deducting all dividends paid or payable on its first and second preferred stock, or if the preferred stock of the Straus Land Corporation is redeemed and its present net assets not reduced, then the sum of \$50,500.00 to be charged against expense account of Straus Land Corporation in lieu of said preferred stock dividend, always, provided, however, that in no case and under no circumstances shall the proportion of said salary of Fifteen Thousand Dollars (\$15,000.00) to be charged in any one year to the said City Real Estate Department exceed Fifty per centum (50%) thereof, or Seven Thousand Five Hundred Dollars (\$7,500.00) per annum.

There shall also be charged to said City Real Estate Department as part of its expenses such proportionate share of the salary and expenses of any other employee of said Corporation who shall devote any part of his services to said City Real Estate Department, which proportionate share shall be determined by mutual agreement between the said second party and Jerome Ackerman.

A separate set of books of account and records shall be kept for the purpose of recording the transactions and results of business of said Department as distinct from those of said first party not connected with said Department.

In the event of the death or permanent disability of said second party, his interest in the Department, within 60 days thereafter, is to be purchased by the party of the first part in the following manner:

The party of the first part is to pay to the party of the second part or his legal representatives the amount due said party of the second part as shown on the books at the last preceding inventory made prior to the death or perma-

ment disability of said party of the second part without any revaluation or reappraisement whatever, accepting said inventory as being conclusive for all purposes up to date of said inventory plus an addition thereto of ten per centum (10%) thereof, which additional ten per centum (10%) is mutually understood to represent full consideration for all fluctuations in value and for the waiving on the part of the party of the second part of any revaluation or reappraisement of the assets composing the said last preceding inventory.

For the services of the party of the second part from the date of said last prior inventory until the date of such death or permanent disability of the party of the second part, the party of the first part is to allow said party of the second part or his legal representatives, for such period, namely: from the date of the last inventory until such death or permanent disability, a salary at the rate of Ten Thousand Dollars (\$10,000.00) per year for the period of months after the end of said fiscal year up to and
45 including the month in which the services of said second party are so terminated by said death or permanent disability, which salary is to be in lieu of and not in participation of any share of the net profits, or losses of said City Real Estate Department for said period of months between the said last prior inventory and such death or disability.

The party of the first part has the privilege of paying for said interest and remuneration as above stated, in either cash or notes secured by mortgage. If the notes secured by mortgage are on Detroit City property they shall draw interest at not less than six percent per annum, payable annually; if secured by farm lands they shall draw interest at not less than five and one-half percent per annum, payable annually. None of the notes are to be due longer than a period of five years from the date at which they are transferred and the payment thereof is to be guaranteed by either the party of the first part or The Straus Brothers Company of Ligonier, Indiana.

It is also mutually agreed and understood by and between the parties hereto, that any reorganization involving the consolidation or merging of the first party hereto with The Straus Brothers Company of Ligonier, Indiana,

shall not be considered as or operate as interfering with the carrying out of this contract, nor shall any change or modification in the terms thereof be involved by reason of such merger or consolidation.

It is also mutually agreed and understood by and between the parties hereto that where guarantee of payment as referred to hereinbefore in reference to mortgages secured by real estate, such guarantee is to be construed as meaning guaranteeing payment so far as the principal is concerned within six months after maturity and interest at maturity.

In witness whereof the parties hereto have this seventh day of February 1916, set their hands and seals in the city of Ligonier, Indiana.

[CORPORATE SEAL.]

STRAUS LAND CORPORATION, LIMITED,
By SIMON J. STRAUS,
V.-Pres.
MAX BERENDT,
Asst. Secy.
JOSEPH L. SELLING.

“EXHIBIT A.”

1. All leaseholds at present owned by Selling & May, who, it is understood are to acquire no more such interests.

2. Interest in Grunow and Patterson, drug corporation, who are to acquire no properties or leases.

3. Interest in Atlantic Realty Company, Seven Mile Road property.

4. Interest in The Equitable Realty Company of Detroit, Radiator Building.

(J. L. SELLING.)

46 (The witness, after examining Petitioner's Exhibit No. 2, at the direction of counsel, resumed.)

This is the contract under which the Straus Land Corporation and I operated this real estate venture. It was executed on the date shown in the contract.

K. 17: I organized the business and virtually conducted it as though it were my own business. I went about the business of buying and selling real estate, and all the negotiations pertaining thereto; and it was un-

derstood that I was to do things as I thought best for the owner and co-owners.

The name of this business was "The City Real Estate Department of the Straus Land Corporation."

We had an entirely separate set of books of account covering this business apart from that of the Straus Land Corporation, which was as separate as though it had been an individual concern and not in any way related to any other business. The books were kept by a bookkeeper of the City Real Estate Department.

T. 18: I did most of the business for this City Real Estate Department. I negotiated contracts, signed the contracts, executed deeds, drew checks, and so forth.

Neither the Straus Land Corporation nor I withdrew any money from the venture from the time it was organized until prior to the final settlement in 1922.

I kept office hours only as I thought best. I did not account to anybody for my time.

T. 18: The next to the last paragraph in division two of the contract, reading as follows: "The said party of the second part shall be elected Vice-President and Assistant Secretary of the Straus Land Corporation, Limited, which office he will hold for the period of this
47 contract. All deeds and instruments of conveyance must be signed by either the President or a Vice-President and attested by the Secretary or an Assistant Secretary of the first party," became a part of the

T. 19: contract under the following circumstances: During the course of our negotiations I had requested from my prospective partners—that may not be the words, but that is the substance—an irrevocable power of attorney to transact business for the City Real Estate Department in order to have absolute power in it; and they said that they would rather not do it in that form, but that they would elect me vice-president and assistant secretary, which would, in fact, accomplish the same purpose.

I was very strong that there should be no misunderstanding, about the fact of the partnership, whatever you call it, because I had volunteered that purely for the reason that I wanted it to be no relationship other than in fact a partnership regardless of whether it is called a joint venture or co-proprietor, or whatever it is called.

That is one of the suggestions taken up in this letter of February 4, 1916. I recall that I made such a suggestion;

I made it both in this letter and also verbally during the course of our negotiations.

The portion of the letter that covers this suggestion is: "That the first party agrees that it will execute an irrevocable power of attorney to the second party, authorizing him to buy and sell real estate, execute and discharge real estate mortgages, and land contracts, execute promissory notes and sign checks for first party upon the bank account of the City Real Estate Department, said power of attorney to run during the life of this contract."

T. 20: The City Real Estate Department had a separate bank account. I drew checks upon that bank account.

In 1916 I had property of the net value of approximately \$100,000.00.

The Straus Land Corporation did contribute additional capital of \$100,000.00. It alone contributed such additional \$100,000.00.

T. 21: The parties made a settlement under this contract, I think, in 1922, if I remember rightly. The contract originally terminated on January 1, 1921, and it was extended for a year. That would bring it down to January 1, 1922. We made a settlement during the last month of 1922.

I did not receive my share of the profits solely in cash.

T. 23: The total profit to me from the venture was \$59,499.95. There was a sharing of the assets respecting this profit prior to 1922. On January 1, 1921, I took \$9,000.00 as a share of a leasehold that the corporation owned. That left a balance of profit due me of \$50,499.95. I received this balance in 1922 in this manner: Cash, \$13,450.76, a mortgage of the face value of \$12,500.00 with interest accrued thereon of \$79.19, and two notes of the Straus Land Corporation, one for \$13,750.00 due January 1, 1924, and the other one for \$13,750.00 due January 1, 1925, which makes a total of \$53,529.95. This total includes interest of \$3,030.00 on the balance because we did not settle until a year after the expiration of our renewed contract, and that was the interest and amount that would have been coming to me if we had settled sooner.

T. 25: There was not any profits from this venture in 1922.

T. 26: By Mr. Foss: The petitioner admits for the purpose of this proceeding that he is on a cash receipts and disbursements basis.

Cross-examination:

The final settlement in 1922 was made under clause six of the contract except the matter was not handled as was provided for in clause six. I mean by that, I do not
49 think we exactly referred to this contract because we did not appoint a third party for arbitrator, or any appraisers.

T. 27: By Mr. Allen: Then, under this contract the amount of \$50,420.76 was not available until 1922, was it? A. It might have been if either party had made a demand for it.

Q. Under that contract do you think that would be possible? A. No, not under the strict wording of the contract.

Q. Did you report that amount as income that might have been earned during the year 1917? A. No.

Q. You did not receive the entire amount of this contract? A. No.

Q. And being on the cash receipts and disbursements basis, you did not believe that you were supposed
T. 28: to report it? A. I did not pay very much attention to it because I did not receive any cash; so I did not make any return on that.

The same is true for the years 1918, 1919, and 1920, except that in one of those years we had a loss so I would not have had to report very much.

In 1921 when I took that interest in the leasehold I reported the \$9,000.00.

T. 29: Q. And \$50,420.76 in 1922, when you received it?
A. Yes, that is the amount.

T. 29-T. 32: Thereupon there was received in evidence, without objection, Respondent's Exhibits A, B, C, D, E, and F, being income tax returns of Joseph L. Selling, signed and sworn to by him, for calendar years 1917, 1918, 1919, 1920, 1921, and 1922, which disclose the following material matters:

50

EXHIBIT A.

*Individual Income Tax Return for Calendar Year 1917 of Jos. L. Selling,
Detroit, Michigan.*

Filed on April 1, 1918, with Collector of Internal Revenue, Detroit,
Michigan.

Schedule A. Income from Salaries, Wages, Commissions, Bonuses,
Directors' Fees and Pensions, and from Professions:

1. By whom received.	2. Occupation.	3. Name and address of employer.	
J. L. Selling.....	President.....	Selling & May, 320 Farwell Bldg., Det.	\$3,000.00
" " "	"	Grunow & Patterson, 320 Farwell Bldg., Det.	5,400.00

Schedule B. Income from Business..... None

Schedule C. Profits from Sale of Real Estate, Stocks, Bonds, and
Other Property None

Schedule D. Income from Rents and Royalties..... None

Schedule E. Interest on Bonds and Other Obligations of the
United States issued since September 1, 1917..... None

Schedule F. Dividends on Stock of Corporation Organized or
Operating in the United States and Subject to In-
come Tax None

Schedule G. Interest on Tax-Free Covenant Bonds..... None

Schedule H. Other Income None

Schedule I. Total Net Income From All Sources..... \$8,400.00

Schedule J. General Deductions 169.03

Schedule K. Total Net Income..... \$8,230.97

Schedule L. Less Excess Profits Taxes, if any, for 1917..... 192.00

Schedule M. Total Net Income..... \$8,038.97

Schedule N. Contributions to Charitable Organizations, etc..... 796.50

Schedule O. Total Net Income on which tax is to be computed.... \$7,242.47
Total tax 416.12

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EXHIBIT B.

*Individual Income Tax Return for Calendar Year 1918 of Joseph L. Selling,
Detroit, Michigan.*

Filed on or before March 15, 1919, with Collector of Internal Revenue,
Detroit, Michigan.

Schedule A. Income from Business or Profession..... None

Schedule B. Income from Salaries, Wages, Commissions, Bonuses,
Directors' Fees and Pensions:

1. By whom received.	2. Occupation.	3. Name and address of employer.	
J. L. Selling.....	President.....	Selling & May, 320 Farwell Bldg.	\$4,500.00
" " "	"	Grunow & Patterson	5,400.00

Schedule C. Income from Partnerships, Personal Service Corporations, and Fiduciaries.....	None
Schedule D. Profit from Sale of Land, Buildings, Stocks, Bonds, and other property.....	None
Schedule E. Income from Rents and Royalties.....	None
Schedule F. Interest on Corporation Bonds Containing Tax-Free Covenant, on which a Tax of 2% was Paid by Debtor Corporation	None
Schedule G. Other Income	None
Schedule H. Total Net Income from Above Sources.....	\$9,900.00
Schedule I. General Deductions not Included Above.....	936.29
Schedule J. Total net income on which a normal tax is to be calculated at 1918 rates.....	\$8,963.71
Schedule K. (a) Dividends on stock of corporations organized or doing business in the United States.....	None
K. (b) Taxable interest on bonds and other obligations of the United States issued after September 1, 1917.	None
Schedule L. Total net income subject to surtax at 1918 rates....	\$8,963.71
Total tax.....	\$650.56

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EXHIBIT C.

Individual Income Tax Return for Calendar Year 1919 of Joseph L. Selling, Detroit, Michigan.

Filed on Feb. 17, 1930, with Collector of Internal Revenue, Detroit, Michigan.

Schedule A. Income from Business or Profession.....	None		
Schedule B. Income from Salaries, Wages, Commissions, Bonuses, Directors' Fees and Pensions:			
1. By whom received.	2. Occupation.	3. Name and address of employer.	
J. L. Selling.....	President.....	Selling & May, 320 Farwell Bldg.	\$4,500.00
Do.	Do.	Grunow & Patterson, 320 Farwell Bldg.	5,400.00
Schedule C. Income from Partnerships, Personal Service Corporations and Fiduciaries.....	None		
Schedule D. Profit from Sale of Land, Buildings, Stocks, Bonds and Other Property, and from Liquidating Dividends	None		
Schedule E. Income from Rents and Royalties.....	None		
Schedule F. Interest on Corporation Bonds Containing Tax-Free Covenant, on which a Tax of 2% was Paid by Debtor Corporation	None		
Schedule G. Other Income	None		
Schedule H. Total Net Income from Above Sources.....	\$9,900.00		
Schedule I. General Deductions not included above:			
Taxes paid.....	\$231.64		
Contributions	718.00		949.64
Schedule J. Total Net income on which normal tax is to be calculated at 1919 rates.....	\$8,950.36		
Schedule K. Dividends	None		
Taxable interest on bonds.....	None		
Other income	None		
Schedule L. Total net income subject to surtax at 1918-19 rates..	\$8,950.36		
Total tax	\$554.51		

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EXHIBIT D.

*Individual Income Tax Return for Calendar Year 1920 of Joseph L. Selling,
Detroit, Michigan.*

Filed on March 11, 1921, with Collector of Internal Revenue, Detroit,
Michigan.

Schedule A. Income from Business or Profession.....	None		
Schedule B. Income from Salaries, Wages, Commissions, Bonuses, Directors' Fees, and Pensions:			
1. By whom received.	2. Occupation.	3. Name and address of employer.	
J. L. Selling.....	President.....	Selling & May, 320 Farwell Bldg.	\$4,500.00
" " "	"	Grunow & Patterson, 320 Farwell Bldg.....	5,400.00
Schedule C. Income from Partnerships, Personal Service Corporations, and Fiduciaries.....	None		
Schedule D. Profit from Sale of Land, Buildings, Stocks, Bonds and Other Property, and from Liquidating Dividends	None		
Schedule E. Income from Rents and Royalties.....	None		
Schedule F. Interest on Corporation Bonds Containing Tax-Free Covenant, on which a Tax of 2% was paid at source	None		
Schedule G. Other Income	None		
Schedule H. Dividends	4,960.00		
Schedule I. Taxable Interest on Liberty Bonds, other obligations of the United States, and War Finance Corporation Bonds	None		
Schedule J. Total Net Income.....	\$14,860.00		
Schedule K. Deductions	844.36		
Schedule L. Net Income	\$14,015.64		
Schedule M. Contributions	981.00		
Schedule N. Net Income upon which Tax is to be Computed.....	\$13,034.64		
Total tax	\$551.67		

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EXHIBIT E.

*Individual Income Tax Return for Calendar Year 1921 of Joseph L. Selling,
Detroit, Michigan.*

Filed on March 6, 1922, with Collector of Internal Revenue, Detroit,
Michigan.

Income.

1. Salaries, Wages, Commissions, etc. (state name and address of person from whom received):	
Selling & May.....	\$4,500.00
Grunow & Patterson.....	5,400.00
2. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds	60.20
3. Income from Partnerships, Fiduciaries, etc. (state name and address of partnerships, etc.): From joint account with Straus Land Corp., Ltd., Farwell Bldg., Detroit.....	9,000.00
4. Rents and Royalties.....	

5. Profit (or loss) from Business or Profession (not including income from partnership)	
6. Profit (or loss) from Sale of Real Estate	
7. Profit (or loss) from Sale of Stocks, Bonds, etc.	
8. Dividends on Stock of Domestic Corporations	9,012.00
9. Taxable Interest on Liberty Bonds, etc.	
10. Other Income: (a) Insurance Commission	31.32
11. Total Income	\$28,003.52
Deductions.	
13. Taxes Paid	726.56
15. Contributions	1,553.00
Total Deductions	2,279.56
Net Income	\$25,723.96
Total tax	\$2,264.60

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EXHIBIT F.

*Individual Income Tax Return for Calendar Year 1922 of J. L. Selling,
Detroit, Michigan.*

Filed March 10, 1923, with Collector of Internal Revenue, Detroit,
Michigan.

Income.

1. Salaries, Wages, Commissions, etc. (state name and address of person from whom received): Straus Land Corporation, Ltd., Detroit, Michigan	\$50,420.76
Grunow & Patterson, Detroit, Michigan	5,400.00
2. Income from Business or Profession	None
3. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds—Straus Land Corporation ..	3,382.01
4. Income from Partnerships, Fiduciaries, etc.	None
5 Rents and Royalties	1,014.76
6. Profit from Sale of Real Estate, Stocks, Bonds, etc. Loss	3,750.00
7. Dividends on stock of Domestic Corporations	9,450.00
8. Taxable interest on Liberty Bonds, etc.	None
9. Other Income	None
10. Total Income	\$65,917.53

Deductions.

11. Losses by Fire, Storm, etc.	None
12. Interest Paid	276.04
13. Taxes Paid	841.82
14. Bad Debts	None
15. Contributions	1,896.50
Total Deductions	3,014.36
Net Income	\$62,903.17
Total Tax	\$12,206.16
Less: Income and profits taxes paid to foreign countries or possessions of the U. S.	6,161.59
Balance of Tax	\$6,044.57

7—5602a

56 T. 33: (The witness resumed:) It is true, as I stated on my direct examination, that I was vice-president of this concern. I had my name on the letterheads of the concern as vice-president.

In reporting this \$50,420.76 I placed it under salaries, wages and commissions, rather than as "income from business or profession" or from partnerships. When I so placed it I did not consider that the sum was salary or wages, but the accountant who prepared this return wrote to the Government and asked them what the relationship was, and the Government decided that this was an employee contract. As I recall, he wrote in 1922, when we were going to settle.

That is the first time I wrote to the Government regarding when this should be reported. I testified previously that I had made no return on this matter.

T. 34: No, it was not my intention, or hope, to find out from the Government when this amount should be reported, what year the tax should be reported. It was not that at all. It was simply to know what the relationship was, and the Government returned the contract with opinion that this was an employee contract, and that hence it was all taxable in 1922.

I did not think it made any difference whatever, and I did not care whether their opinion of the relationship was that of employee so long as the relationship was actually that of partnership or co-proprietor between us—I did not care what the rest of the world thought.

I did not know anything about the statute of limitations. There was not any intention of taking any advantage of the statute of limitations, I will say that.

I was willing to pay the Government my 1916, 1917, 1918, 1919, 1920, and 1921 taxes.

57 T. 35: By Mr. Allen: I might state, your Honor, to the Board that petitioner's counsel has stated to me that there was a ruling made on this case. If I were in possession of the ruling, I would be glad to introduce it in evidence, but I still think it has no bearing on the case except that petitioner has brought the matter in, and I wish to say that the files in the case contain no record of any such ruling.

T. 36: (The witness resumed:) I have no records to show how the Straus Land Corporation handled

this matter. I have no records, papers, or data of any sort with me.

In respect of the \$9,000.00 that I reported in 1921, that was a partial settlement which I considered available at that time. Yes, having received that I reported that as income received.

T. 37: Well, as to the amount of \$50,420.76 reported in the 1922 return, I would not say it was not available until 1922, but no effort was made on the part of either of the parties to the contract to obtain it. No, no, I do not mean that the parties made no effort to determine any distributable share; I mean to obtain any. The distributable share was determined every year.

T. 38: No, it was not possible to determine the distributable share under the terms of the contract which provided for losses. Therefore, there was no effort made to get that particular amount at that time. I am not so sure that I could not have gotten settlement until 1922 on that contract if either party had made a demand for it. It was the intention of this alleged partnership that the money should remain in the business during the life of the contract. I do not think any man with a salary would ever wait for five years for his "alleged" salary.

58 Redirect examination:

T. 38: This contract was drawn between Mr. Straus and myself.

T. 39: I did not have a lawyer to help me draw it, or anybody with legal knowledge. There was no lawyer, and no attention paid to the wording of it particularly, except that I wanted it clearly understood about the profits and losses. That was really the only part that I attached any significance to, as I have stated before.

On my direct examination, I said that there were books kept of the business operations. Such books were kept.

T. 40: On my cross examination, I stated that it was not possible to determine my share of the profits, or the share of the profits of the lands of the Straus Land Corporation. I did not mean that unqualifiedly. The profits could be determined for each year, but under the contract I believed that it was better to await the final end

before taking any of those profits in case there should be subsequent losses which I might have had to pay out of my pocket. I know that there was a determination of profits from year to year; there was such determination.

The loss that I spoke of was deducted from the previous year's credit of profits, or, as I recall it, possibly from the total credit balance standing in my name.

In answer to a question by the counsel for the Government I stated that I did not receive any of this profit until in 1921 or 1922. I used the word "received" to mean that I did not actually get any money. I refer to the settlement as being the final settlement but each year we stated plainly on our books just what the amount was due to the Straus Land Corporation and was due to me. At the end of each year, we took inventory and stated plainly just exactly what the share was.

59 T. 41: I do not really remember what is being referred to in asking me what I meant by the word "received" as I answered the question by the counsel for the Government.

No, I did not receive any of the profits until 1921 and 1922, but I received credit for them each year on the books of the City Real Estate Department.

Recross-examination:

No, I do not think my return for each year did show those credits each year. I do not think that would do it. I did have a memorandum, but it is such a long time back I do not believe I have it.

T. 42: (The witness, after examining the income tax return of the Straus Land Corporation for the year 1922, resumed.)

I do not see any item in that return that refers to those credits.

We had a regular set of books, a business set of books, and they were closed each year. I have tried very hard to get those books, but this was an office and they had another office in Indiana and they had sent those old books down there and I never was able to get them. I would have liked to. I tried very hard to get them long before this hearing.

T. 43: Abe Ackerman is still living, the president of this company. He is the only surviving member. He would give me the books if he had them. They could not find the books.

I do know the exact amount, what might have been earned each year. The settlement shows that. We have a copy of an audit made by an accountant. I relied on the accountant entirely.

60 It is stipulated and agreed by and between the parties to this proceeding through their respective attorneys that the foregoing Statement of Evidence contains all the evidence adduced at the hearing before the United States Board of Tax Appeals.

ARTHUR R. FOSS,

Attorney for Petitioner.

C. M. CHAREST,

*General Counsel of the Bureau of
Internal Revenue, Attorney for the
Commissioner of Internal Revenue.*

The foregoing Statement of Evidence is hereby approved and settled this 22nd day of January, 1932.

(S.)

ERNEST H. VAN FOSSAN,

Member United States Board of Tax Appeals.

61 United States Board of Tax Appeals. Filed
Jan. 21, 1932.

Copy.

Before the United States Board of Tax Appeals.

Docket No. 31384.

UNION GUARDIAN TRUST COMPANY, as Executor of the Estate of Joseph L. Selling, Deceased, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Præcipe for Record.

Filed January 21, 1932.

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, certify and transmit to the Clerk of the Court of Appeals of the District of

Columbia, in accordance with the rules of said Court, a transcript of the record in the above cause, and to include in said transcript of record, the following documents or certified copies thereof, to-wit:

(1) The docket entries of all proceedings before the United States Board of Tax Appeals.

(2) All pleadings before the Board of Tax Appeals, including the petition for redetermination as amended June 3, 1930, and the answer of the respondent to said petition as amended.

(3) The findings of fact and opinion of the Board of Tax Appeals.

(4) The order of redetermination of March 27, 1931.

(5) Suggestion of Death of Petitioner and Substitution of Party Petitioner.

(6) Order of September 22, 1931, vacating decision entered on March 27, 1931.

62 (7) Order of September 22, 1931, substituting the Union Guardian Trust Company, Executor of Estate of Joseph L. Selling, deceased, as petitioner.

(8) Decision of September 24, 1931.

(9) Agreement under paragraph (d), Section 1002, Revenue Act of 1926, that the review shall be by the Court of Appeals of the District of Columbia.

(10) The petition for review.

(11) The Notice of filing petition for review and proof of service.

(12) The statement of evidence and order of settlement.

(13) Orders enlarging the time for transmission of the transcript of record. Not included in record.

(14) This Præcipe.

ARTHUR R. FOSS,
ARTHUR R. FOSS,
Attorney for Petitioner.

Service of a copy of the foregoing præcipe is hereby acknowledged this 21st day of January, 1932. The privilege of filing a counter præcipe is hereby waived.

C. M. CHAREST,
*General Counsel, Bureau of Internal
Revenue, Attorney for Respondent.*

63

Docket No. 31384.

UNION GUARDIAN TRUST COMPANY, as Executor of the Estate
of Joseph L. Selling, Dec'd, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Certificate.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 62, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Præcipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 28th day of January A. D. 1932.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk.

64

United States Board of Tax Appeals.

Docket No. 31384.

UNION GUARDIAN TRUST COMPANY, Executor of the Estate
of Joseph L. Selling, Dec'd, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order Enlarging Time.

On motion of counsel for the petitioner, it is

Ordered that the time for preparation of the evidence and transmission and delivery of the record *sur* petition for review of the above entitled proceeding in the Court of Appeals for the District of Columbia, be and it is hereby extended to January 23, 1932.

(Signed)

LOGAN MORRIS,
Member.

Dated Washington, D. C., Nov. 24, 1931.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

65 United States Board of Tax Appeals.

Docket No. 31384.

UNION GUARDIAN TRUST COMPANY, Executor of the Estate
of Joseph Selling, Deceased, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order Enlarging Time.

Pursuant to stipulation between the parties, it is

Ordered that the time for preparation of the evidence and
for transmission and delivery of the record *sur* petition
for review of the above entitled proceeding in the Court of
Appeals of the District of Columbia be and it is hereby ex-
tended to February 23, 1932.

(Signed)

LOGAN MORRIS,
Member.

Dated Washington, D. C., January 21, 1932.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Endorsed on cover: Board of Tax Appeals. No. 5602.
Union Guardian Trust Company, Executor of the Estate of
Joseph L. Selling, dec'd., appellant, vs. David Burnet, Com-
missioner of Internal Revenue. Court of Appeals, Dis-
trict of Columbia. Filed Feb. 2, 1932. Henry W. Hodges,
Clerk.

Henry M. Hodges
Court of Appeals, District of Columbia

JANUARY TERM, 1932.

Case No. 5602.

UNION GUARDIAN TRUST COMPANY, EXECUTOR OF THE
ESTATE OF JOSEPH L. SELLING, DECEASED,

Appellant,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE,

Appellee.

ON PETITION TO REVIEW THE DECISION OF THE UNITED STATES
BOARD OF TAX APPEALS.

BRIEF FOR THE APPELLANT.

FREDERICK L. PEARCE,

ARNOLD R. BAAR,

ARTHUR R. FOSS,

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Court of Appeals, District of Columbia

JANUARY TERM, 1932.

CASE No. 5602.

UNION GUARDIAN TRUST COMPANY, EXECUTOR OF THE
ESTATE OF JOSEPH L. SELLING, DECEASED,
Appellant,

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE,
Appellee.

ON PETITION TO REVIEW THE DECISION OF THE UNITED STATES
BOARD OF TAX APPEALS.

BRIEF FOR THE APPELLANT.

DECISION BELOW.

The findings of fact and opinion of the United States Board of Tax Appeals (R. 9) are officially reported in 22 B. T. A. 920. The final order of redetermination in favor of the Respondent (the appellee here) was entered on September 24, 1931 (R. 23).

JURISDICTION.

The appellant is a Michigan corporation, having its principal office and place of business in Detroit, Michigan, and is executor of the last will and testament of Joseph L. Selling, deceased. The income tax return which is in question was not filed by the appellant but was filed by Joseph L. Selling while an inhabitant of Detroit, Michigan, who has since died. Upon suggestion on the record of the death of said Joseph L. Selling and of the appointment of the appellant as the executor of his estate (R. 18), the Board substituted appellant as the petitioner in the place and stead of the taxpayer (R. 21) and the final order of redetermination was entered against appellant as said executor (R. 23).

The appellant and appellee have agreed and stipulated that the decision of the Board may be reviewed by this Court (R. 23). From said decision the appellant filed with said Board on September 25, 1931, its petition for review by this Court.

The jurisdiction of this Court is invoked under Sections 1001 and 1002 (b) and (d) of the Revenue Act of 1926, as amended.

STATEMENT OF THE CASE.

The controversy between the Commissioner of Internal Revenue and the appellant, which has been determined by the Board of Tax Appeals, and as to which review is sought, involves a deficiency in income tax of an individual, formerly an inhabitant of Detroit, Michigan, but now deceased, for the calendar year 1922, in the amount \$6,161.59 and the amount of any overpayment of such tax for that year (R. 3-9).

In his income tax return for said calendar year the individual taxpayer (hereafter referred to as Selling) reported as an item of gross income a sum of \$50,420.76 indicated as being "salary, wages or commissions, etc.," received from Straus Land Corporation, Ltd., Detroit, Michigan (R. 49). The total tax shown on that return was \$12,206.16 against which was claimed a credit of \$6,161.59 for income and profits taxes paid to foreign countries or possessions of the United States, leaving a balance of tax of \$6,044.57. On his review of said return the Commissioner disallowed the claimed credit for foreign income taxes and determined a deficiency in the amount thereof. While the propriety of the disallowance of that credit is not now questioned, the entire amount of the asserted deficiency is nevertheless in controversy due to the refusal of the Commissioner to eliminate the above-mentioned item of \$50,420.76 from gross income for the year 1922 (R. 5-8).

The sum of \$50,420.76 of income was derived by Selling in a real estate venture with a corporation, Straus Land Corporation, Limited, which was started early in the year 1916 and continued in active operation until some time in the year 1921.

Under the agreement between the two parties (R. 34) the corporation was to furnish the capital for the venture and Selling his services. The annual profits or losses of the venture were to be shared by each, Selling's portion being as follows: 50% of the first \$10,000, 40% of the second \$10,000, 25% of the third \$10,000 and 15% of all over \$30,000. His proportion of such annual earnings or losses, if any, was to be debited or credited to him on the books of the venture at the end of each year but the final settlement and payment thereof was to be made only at the termination of the agreement. (Clause 3 of agreement, R. 36-37.) The corporation likewise was not to

withdraw any of its share of the profits until the final settlement (Clause 6 of contract, R. 38).

The venture had a name, it had a separate capital, it kept a separate set of books and records, and it had a separate bank account. The profits were determined at the end of each year and Selling was then credited with his share thereof (Findings, R. 14-15).

At the termination of the agreement the assets of the venture were distributable as follows (Clause 7 of contract, R. 38-39):

(1) All liabilities incurred by the corporation on behalf of the venture were to be first paid.

(2) The corporation then had first choice of the assets to be withdrawn up to the extent of the capital contributed by it together with interest at 6 per cent per annum on all except the original contribution of \$100,000.00.

(3) Selling had the next choice of the then remaining assets to be divided, to an amount equivalent in value to his share of the net profits.

(4) The corporation had the balance of said assets.

The enterprise was successful and the net profits, which were entirely derived during its operating life ending prior to 1922, were distributed partly in 1921 and the balance in 1922. In the partial division occurring on January 1, 1921, Selling took over a leasehold of the value of \$9,000.00 for that much of his share of the profits. In the final division in 1922 he received in cash, notes and a mortgage the sum of \$50,420.76, together with interest on the same from January 1, 1921. This sum represented the total balance of his share in the profits of the venture. (Findings, R. 15.) This balance of the profits is the item which the Board held taxable as income of the year 1922, but which appellant contends was income derived in years prior to 1922 and hence not taxable for 1922.

QUESTION PRESENTED.

The basic question involved in this proceeding is one of law, namely, whether under the provisions of the contract in this case, as construed in connection with the circumstances of the inception of the contract and its performance, the taxpayer's share of the profits derived in the real estate venture during the five or six-year period prior to the year 1922 was taxable as income of the year 1922 to the extent of \$50,420.76.

ERRORS RELIED UPON*.

The United States Board of Tax Appeals erred in holding, contrary to its findings of fact and contrary to and without support of evidence, that the sum of \$50,420.76, which was part of the individual taxpayer's share of the net profits derived in the five or six-year period prior to January 1, 1922, under his contract with the Straus Land Corporation, Limited, was taxable income of the year 1922, in that

(1) Selling was a co-owner of the assets and profits of the venture and did not receive his share of the profits as compensation for services rendered as an employee.

(2) As co-owner Selling "received" his share of the profits as they were derived in the venture.

(3) Even if Selling was an employee, his share of the profits of the venture was received by him prior to the year 1922.

* All the errors assigned in the Petition for Review are relied upon but have been reworded as above for convenience in developing the argument.

THE ARGUMENT.

(1) Selling Was a Co-Owner of the Assets and Profits of the Venture and Did Not Receive His Share of the Profits as Compensation for Services Rendered as an Employee.

The determination of the question whether Selling was a co-owner with the Straus Land Corporation, Limited, of the real estate venture or was an employee whose share of the profits was compensation for services rendered as an employee will depend largely upon the terms of the written agreement (R. 34-42) which governed their association with each other.

The Board Misapprehended the Issue.

The determination by the Board that Selling was an employee may be due in part to a misapprehension of the alternatives presented by the issue. In the opinion below (R. 15-17) the Board seems to assume that the question was confined to a choice between the conception of a partnership and that of an employment. With this assumed alternative before it, the Board then quotes from Section 218 (a) of the Revenue Act of 1921 a provision as follows: "That *individuals* carrying on business in partnership shall be liable for income tax only in their *individual* capacity." (Italics supplied by the Board.) The Board then held that this statutory provision referred only to ordinary partnerships, that is, those whose members were individuals, and hence that it did not permit the recognition of the relationship in this case as a partnership because, while one member was an individual, the

other was a corporation. With the elimination of this assumed alternative, there remained only the other, that of employment, and the Board accepted it.

The Board, however, misconceived the nature of the alternative presented by this question. In his petition to the Board, Selling contended that he was either a partner or a co-owner or co-proprietor of the business (R. 3-4). The appellant therefore is not required to accept the alternative presented by the Board that Selling was either a partner or an employee, or that he was an employee merely because one provision of the Revenue Act apparently concerns itself only with partnerships whose members are individuals. Conceding that he was not a partner, because technically there was no partnership, he still may have been a co-owner or a co-proprietor of the business and of the income. Such a relationship is very definitely recognized as a basis of income tax liability under the statute.

The Board, therefore, grievously erred in thus unjustifiedly limiting the question.

If The Contract Created a Co-proprietorship It Is Immaterial That There May Have Been No Co-Partnership.

If Selling was a principal and not an employee in this real estate venture, it is not important that the written contract may not have created the precise form of co-ownership, i.e., a co-partnership, which the Board held that it could not recognize under its interpretation of the Revenue Act. As will be shown in the second main part of this argument, the result from income tax purposes is the same as provided for partnerships if the relationship in this case is established as being any

other form of co-ownership, as, for example a joint adventure.

A joint adventure is closely analogous to the partnership type of co-ownership. In *Atlas Realty Co. v. Galt* (Md. 1927), 139 Atl. 285, the court formulated in clear language the tests to be applied in determining the existence of a joint adventure, which tests have also been expressed by the Board of Tax Appeals in substantially the same language in *Alfred M. Bedell v. Commissioner*, 9 B. T. A. 220, affirmed in 30 F. (2d) (622). The Court said:

“While a joint adventure may be distinguished from a partnership, nevertheless they are both so much alike that it is often very difficult to differentiate them. And to establish either it is necessary to do more than show that the persons said to be so associated are to share in the profits of a transaction. *Clark v. Muir*, 298 Ill. 548, 132 N. E. 1932; *Manker v. Tough*, 79 Kan. 46, 98 P. 792, 19 L. R. A. (N. S.) 675, and 17 Ann. Cas. 208; 33 C. J. 844. But it is essential to show that they have a joint proprietary interest, or that they are to share losses as well as profits, or that they have a joint control over the subject matter of the adventure or of the manner in which it is to be carried out. * * *

When these tests are applied to the facts in this case, it will appear that Selling was a party to a joint adventure.

The Nature of the Relationship Must Be Determined From the Entire Contract and Surrounding Circumstances.

Some of the language in the contract is suggestive of a relationship of employment while other provisions are emphatically indicative of a relationship of ownership.

The Board alluded to this apparent ambiguity in the contract in a few words as follows (R. 16):

“It will scarcely be gainsaid that the contract in question contains provisions lending color to both interpretations. It provided for a sharing of profits and losses. In this it suggests a partnership. But it expressly provides that Straus Land Corporation, Limited, ‘agrees to and does hereby employ’ petitioner, who in turn ‘agrees to and does engage his services’ to the land corporation. It further provides that petitioner ‘shall receive and hereby agrees to accept in full as a salary for all his services’, a fixed proportion of the profits. This language strongly suggests a contract of employment.”

In this portion of its opinion, the Board has cited all the significant language which, standing alone, would indicate a contract of employment. But notwithstanding the implication from the use of such words, other and more decisive provisions of the contract indicate more accurately the real nature of the relationship, as will be shown in the course of this brief.

Although the words “employee” and “salary” are ordinarily used only in connection with an employment, the use of such words in this contract should not be regarded as conclusive in construing the real character of the association. Other terms or provisions should also be given due weight, because it is a cardinal rule of construction that a contract must be construed as a whole and that the intention of the parties is to be collected from the entire instrument and not from detached portions. 13 Corpus Juris 525.

This rule should especially be applied to an agreement drawn by the parties themselves who, as in this case, were without benefit of legal knowledge or professional advice (R. 51, fol. 58). In such a situation words of distinctive legal meaning are apt to be used without

appreciation of their inappropriateness. For example, in violation of the accepted meaning or definition of the word "salary," it was used in this contract although no compensation was paid or was stipulated to be paid at regular intervals, nor was there any fixed stipend.

The use of such words, when considered in the light of the fundamental provisions of the contract, was entirely inconsistent with the real purpose of the parties. In this case the basic provisions of the contract conclusively negative the apparent implication of employment given by those inappropriate words.

Selling Was to Share Profits and Losses.

In determining the real character of the relationship of the parties under the contract, the most significant provision is clause 3 thereof (R. 36-37), which stipulates that Selling was to share in the annual profits and losses of the venture upon the following basis:

50% of the first	\$10,000.00
40% of the second	\$10,000.00
25% of the third	\$10,000.00
15% of all over	\$30,000.00

Such annual earnings and losses, if any, were to be set up and debited or credited to him on the books of the business at the end of each year of the period of the contract. In one year the net result of the operations was a loss and Selling was charged with his share thereof (R. 45, 52).

It should be noted that this provision covering sharing of losses contains no limitation on the amount of the loss for which Selling might be responsible, and at the time he entered into the contract he was worth about \$100,000.00 (R. 14, 44). If the net result of the operations for the entire period under the contract had been

a loss, he would have been responsible under this provision of the contract for his share thereof. Thus, his "salary" would have been money paid by him to the corporation rather than a payment by the corporation to him.

This provision alone is sufficient to discredit the Board's holding that Selling was an employee and to establish that Selling was a co-owner of the enterprise (*Atlas Realty Co. v. Galt, supra*).

No principle of general law is more universally accepted than that a sharing of profits and losses is a criterion of co-ownership. Numerous citations of cases so ruling would serve no useful purpose, but the following cases, because they are comparable on the main facts with the instant case, will be particularly pertinent. While they involve only one type of co-ownership, *i. e.*, co-partnership, they are nevertheless significant in this connection inasmuch as the joint adventure form is so closely akin to the co-partnership form of co-ownership.

Certainly, if the contract in the instant case would have created a legal co-partnership except for the fact that one of the parties was a corporation, the agreement must be deemed to have created at least a joint adventure. In *Corpus Juris*, Volume 14a, pages 293-294, the general law is stated as follows:

"* * * a corporation may in furtherance of the object of its creation contract with an individual, although the legal effect of the contract may be to impose upon it the liability of a partner. So where a corporation and another have assumed to enter into a partnership and jointly transact a business together, they may recover, by reason of their joint interest, upon obligations made to them in their partnership name although the corporation may have had no power to enter into a partnership. A corporation * * * may become a co-owner with an individual in a business or enterprise within the scope of its corporate powers."

In *Leber v. Dietz*, 49 N. Y. S. 1002, 22 Misc. Rep. 524, it appeared that a firm maintained a separate drug department concerning which they had a written agreement with the defendant. By this contract, they agreed "to furnish the capital." The said department was to be charged with interest, expenses, office rent, wages, etc. The defendant was "to manage the purchases and sales." Annual accountings were to be had, and the profits and losses ascertained. The net profits were to be divided, one-half to the firm, and one-half to the defendant. Losses were to be borne in the same proportion. Defendant received no salary. His profits were to be accumulated and to remain in the business at interest. In an action between these parties it was held that the defendant was a partner in the drug department.

Since the facts in the instant case are closely parallel to those in the *Leber* case, it would be contrary to this precedent to hold that Selling was an employee. In the *Leber* case the enterprise was a separate drug department; here it was a separate city real estate department. Also in that case, as here, the one party furnished the capital, the department bore its own expenses, annual accountings were had, and defendant received no "salary" but his share of the profits were to accumulate and remain in the business.

In the case of *Gnann v. Cameron*, 29 Ga. App. 608, 116 S. E. 338, the Court took particular note of the sharing of losses even to the extent of sharing capital losses. The suit involved the claim of Cameron against Gnann for alleged violation of a contract which he contended was one establishing a partnership. He asked for an accounting and for the recovery of such sum as might be found to be due him as a partner. The defense of Gnann was that the contract was one merely of employment, by which he was the employer and Cameron the employee.

The contract recited that Gnann was the sole owner of the Owl Drug Company and that Cameron was a licensed druggist. An inventory of the stock, fixtures and furniture was to be taken as of the date of the contract and their commercial value charged to Cameron. Certain purchases were to be made by Cameron only by mutual consent of both. Cameron was to have half of the net profits. He was to receive from \$25 to \$50 per week, "same to be considered a drawing account," to be deducted from his share of the net profits. If at the expiration of the contract the inventory should be less than the original inventory, Cameron was chargeable to the extent of one-half of the difference. The Court said:

"It is clear that this contract, not only provides that Cameron is to share in the profits, but that, if the inventories show the capital invested to diminish, no matter to what extent, he is to share also in the resulting losses. The contract undoubtedly created a partnership."

In comparing the present case with the Gnann case, it appears that, besides the common element of sharing profits and losses, in the cited case certain purchases were to be made only by mutual consent of the parties, as in the instant case. However, Cameron had a drawing account of \$25 to \$50 per week, a feature which is absent here and greatly contributing to the strength of appellant's case.

A case which is important, not only because the facts are substantially analogous to those in this case, but also for a very clear expression of the law, is *Couch v. Woodruff*, 63 Ala. 466. The bill in the case was to compel a settlement of the accounts of a partnership alleged to have existed between said Couch and one Harrell under an agreement which provided:

"Know all men by these presents, that whereas W. H. Couch is desirous of enlarging and extending his

present commission business, and desires to engage the services of O. F. Harrell and W. M. Ethridge; we * * * enter into the following agreement, until the first of January, 1872: 1. Said Couch is to invest a capital of \$10,000 in said business * * * 2. He is to employ the services of W. M. Ethridge, at a salary of \$1,500 a year * * *. 3. For the influence and business qualifications of said O. F. Harrell, said Couch agrees to give him the half of the net profits of said business, after all expenses are paid. 4. Said Couch is not to draw out any of said capital of \$10,000, until January 1st, 1872; at which time he is to pay said Harrell his half of the net profits of the business, if any. 5. Said Couch, Harrell, and Ethridge agree to give their whole time and attention to the promotion of the interest of the * * * business."

Harrell also stipulated "that whereas W. H. Couch has this day engaged my services in the commission business * * * for the half of the net profits of the said business, I hereby agree that, if said business sustains a loss in conducting it, I am to pay the half of said loss."

The court said in part, page 472:

"It may be safely asserted, as the result of the authorities, it seems to us, that where there is a communion of profit and loss—when the party is not only entitled to share in the profits, but must bear the losses, whereby he may not only be excluded from all compensation, but involved in liability he can be compelled to discharge from his individual, separate property; when it is plain that he looked beyond the personal responsibility of his associate, to an interest or lien upon the resulting property or proceeds—a right beyond that of an ordinary creditor, which would survive the death or bankruptcy of his associate; a mere agency, or employment as a servant, is excluded, and, as between themselves, the parties are partners. (Citing cases.) Applying this test to the agreement of these parties, when it is read in the light of the circumstances, and construed according to its obvious meaning, we think a mere agency, mere employment on the part of Harrell, is excluded, and that, as between themselves, he and Couch were partners."

The rule of these cited cases may be shortly stated as: a partnership is the result of an agreement to share profits and losses. That is the rule says a noted commentator in this field of law (Lindley, Law of Partnership, 9th Ed., p. 49):

“An agreement to share profits and losses, in the sense of making good the losses if any are sustained may be said to be the type of a partnership contract. Whatever difference of opinion there may be as to other matters, persons engaged in any trade, business, or adventure upon the terms of sharing the profits and making good all losses arising therefrom, are necessarily to some extent partners in that trade, business, or adventure; nor is the writer aware of any case (unless it be *In re Jane*) in which persons who have agreed to share profits and losses in this sense have been held not to be partners.”

These authorities are sufficient to show that when Selling contracted to give his services for a share of the profits and obligated himself to share the losses in the same proportion as provided for profits, he certainly did not become an employee and his share of the profits was not “salary.”

Selling Had Control of the Enterprise as a Principal

That Selling was no employee is further demonstrated by the evidence that he virtually conducted the enterprise as though it were his own. He did most of the business, negotiating the contracts for the purchase or sale of real estate, signing contracts, executing deeds, and drawing checks on the bank account.

The contract was so drawn as to permit him to do this. In negotiating the terms of the contract, Selling had originally proposed that he be provided with an irrevocable power of attorney to transact the business of the

venture in order to have absolute power in it, but the other party would rather not do it in that form and instead they consented to a provision in the contract to make him a vice-president and assistant secretary of the corporation, which would, in fact, accomplish the same purpose (R. 43, Folio 47). Those terms found expression in the last paragraph of clause 2 of the contract.

Furthermore, under the contract Selling had control as a principal in the business. Only in case the cost of a parcel of real estate exceeded \$10,000.00 did he need the consent of the other party to make the purchase. Minimum selling prices were to be fixed by both parties.

Such actual control of the business by Selling is particularly significant when it is considered in connection with the fact that the enterprise was organized and operated as a distinct business entity. It had a name, a separate capital, a separate set of books of account and records, and a separate bank account. All expenses of the business were to be borne by it and all profits derived were to be retained by it for the period of the contract.

Selling Had an Owner's Interest in the Assets of the Enterprise

The fact that all notes, mortgages, contracts and deeds for real estate were to be taken in the name of the corporate member of the enterprise should be considered in connection with the provision of the contract that at the termination of the contract the assets were to be *divided in kind*, the corporation, after provision for liabilities, to have first choice up to the amount of its advancement of capital and Selling to have next choice of the remaining assets to the extent of his share of the

profits and the corporation to take the balance (R. 38-39). This provision for division of assets in kind gave Selling an interest as a co-owner of the assets to the extent of his share of the profits which were currently determined and credited to him.

Selling therefore had an interest in the assets of the enterprise as an owner, to the extent of his profits, although for convenience the specified kinds of assets were held in the name of the corporation. Apparently the cash was held in the name of the enterprise, since it had its own bank account. This amounts to an ownership of the profits as and when they were derived. It is an additional item which negatives the status of employment and is very persuasive evidence of a status as principal.

Selling's Share of the Profits Was Not "Salary."

Another fact in this case that weighs against the Board's holding of employment is that neither party to the contract was to withdraw any of the profits until the termination of the agreement. Selling received nothing in the form of current compensation or drawing allowance and none was stipulated in the contract. The contract provided for a five year period of existence. It is against common experience that a person, seeking employment, will contract to wait five or more years for his "salary" for services to be currently performed.

In this case no withdrawals of cash were made by either party until 1922, or at least six years after the arrangement began. The first withdrawals of any kind were made in 1921, when there was a partial division of assets in kind and the petitioner took an interest in a leasehold of a value of \$9000.00 in segregation of that

much of the profits then standing to his credit. The next and final division of the assets occurred in 1922. It therefore seems to be a violation of the ordinary meaning of the word "salary" to denominate Selling's share of the profits under this contract as the compensation of an employee.

*Selling Intended His Relationship to be That of
Co-Owner.*

In addition to the provisions of the contract so far referred to, there is the testimony of the individual party to the contract as to what his intention was in entering upon his association with the Straus Land Corporation, Limited. To the extent that the contract may be deemed ambiguous from the use of such words as "salary" and "employ" in connection with the basic provisions indicating co-ownership, such evidence of intention is significant.

Selling testified unequivocally that he intended to become a co-partner or co-owner in this venture (R. 31-32). He had been in business for himself prior to becoming a party to this contract (R. 30) and at that time he was worth approximately \$100,000.00 (R. 44, fol. 48). It is fair to assume that a man being in business for himself and having that much of the world's goods would ordinarily embark upon a similar business venture only as a principal rather than as a servant. Furthermore, he was related to two members of the corporation and was intimately acquainted with the third member, which circumstances made the status of employee repugnant to him (R. 31).

The recollection of the witness as to his intention and his expression thereof to the other party to the contract

was clear. He had expressed himself orally during the negotiations and had also written a letter to the other party (R. 32-34, 43-44) stating in emphatic terms what he wanted to be in this contemplated association. This evidence, taken in connection with the other provisions of the contract, especially those relating to sharing losses as well as profits and to the division of assets in kind, should be sufficient proof that the petitioner was a co-owner of this business venture.

Summary: Under the Contract Selling was a Joint Venturer.

While other authorities have been consulted, the principal purpose so far has been to show that under the tests formulated in *Atlas Realty Co. v. Galt, supra*, Selling was a co-owner of the real estate venture.

One of these tests, and under the authorities a conclusive one, is the sharing of losses as well as profits. This element appears in this case. No amount of argument can eliminate it.

The second test, together with sharing profits, is joint control over the subject matter of the venture or of the manner in which it is to be carried on. Selling undoubtedly had such joint control and a share of the profits.

The third test, which in connection with sharing profits, is sufficient to create a joint venture, is that the parties have a joint proprietary interest. Selling had this interest as shown by the provision for division of the assets in kind at the termination of the agreement.

Each of these three factors, any one of which together with the sharing of profits is sufficient to create the relationship of joint adventure, is present in the instant

case. There is therefore a three-point proof of such relationship and of such ownership.

It is therefore submitted that in view of all the facts and circumstances in this case and the law applicable thereto, Selling was not an employee in the real estate venture with the Straus Land Corporation, Limited, but was a principal, with the rights, interest and responsibility of an owner.

(2) As Co-Owner, Selling "Received" His Share of the Profits As They Were Derived in the Venture.

The time of the actual division of assets between these parties does not have any significance for income tax purposes. It is a fundamental income tax principle that a co-owner of an enterprise is taxable upon his share of the profits at the time they are realized, whether or not they are then actually separated from the enterprise and distributed to the parties. This principle has been applied by the Board in several cases.

Thus in the most simple form of co-ownership of property, such as a tenancy in common, it is settled that the profits therefrom are taxable to the owners in the year derived. It does not matter that pursuant to agreement a portion of the profits is not actually distributed to the owners, but is retained for some purpose in furtherance of the common interests. *Appeal of C. W. Gallagher*, 2 B. T. A. 1057.

The *Gallagher* case involved a tenancy in common of an orchard. The Commissioner of Internal Revenue asserted that the profits from the orchard were taxable in the year realized although a portion of the profits were not actually distributed to the tenants until the subsequent year. The co-owners numbered eight, one of whom operated the business as a superintendent. The superintendent made a distribution of the profits on the first day of March of each year. The profits in 1919 were \$79,719.88, of which Gallagher's share was \$9,964.99. He received \$8,000 of this sum from the superintendent in 1919 and the balance on March 1, 1920. In his return for 1919 on the cash receipts and disbursements basis he reported only the \$8,000 which the superintendent had distributed to him in that year. The Commissioner as-

sented that all of his share of the profits was taxable in 1919. The Board agreed with the Commissioner.

In another case, *Appeal of Ferry Market Company, Inc.*, 5 B. T. A. 167, the taxpayer, a corporation, was one of several co-owners of two steam schooners and one of the co-owners, not the taxpayer, was the manager of the enterprise. The manager did not distribute all of the net earnings of 1918 and 1919 but retained a portion thereof as a reserve against the expenses of future operations. The taxpayer reported only the amount actually received from the manager during those two years. The Commissioner added the amounts that the manager had not distributed. The Board of Tax Appeals held that the Commissioner's determination was correct. The Board said in part (at p. 169):

"We are of the opinion that the managing owner of a vessel jointly owned by several co-owners is the agent of such co-owners and that the net earnings received by him must be regarded as received by the several co-owners in the proportion of their interests in such vessel. While the co-ownership of a vessel does not constitute a partnership or a joint stock association, it does result in the creation of an operating entity that earns income by the use of capital. Such income is taxable."

In a third case, *Walter S. Dickey v. Commissioner*, 14 B. T. A. 1295, acquiesced in by the Commissioner of Internal Revenue, IX-1 C. B. 15, an individual and two corporations formed a syndicate in 1912 for the purchase and sale of a telephone company. Each contributed a third of the cash capital of the syndicate. One of the corporate members was the manager of the syndicate and its banker. The accounts thereof were kept by said member. By 1918 the syndicate had acquired all the stock of the telephone company. During 1919 the syndicate sold such stock for bonds and then the

bonds were sold for cash. During 1919 each member received a partial distribution of the proceeds and in 1920 each received \$100,000 as a final distribution. Dickey, the *individual* member of the venture, did not report the \$100,000 distribution in 1920 on his income tax return and the Commissioner asserted a tax thereon for that year. Dickey contended that if the same was income, it was taxable not for 1920 but for 1919. The Board of Tax Appeals held that the distribution in 1920 was taxable income for 1919 and not for 1920. The Board said in part as follows (p. 1306):

“The petitioner was a co-owner with the other two members of the syndicate of the assets of the syndicate. The syndicate was not a taxable entity. The receipt of income by the syndicate was receipt of income by the co-owners. * * * All the income of the syndicate in 1919 was income of the members of the syndicate in that year and not in the year 1920.”

Clearly the Dickey case is a precedent for holding that Selling's share of the profits here involved was not taxable as income for the year 1922. In that case there was a partial distribution in one year and a final distribution in the following year, just as in the instant case. In that case the syndicate realized the profit of the venture in July, 1919. Part of the profits was immediately distributed but the balance was not distributed until the following year. In the instant case all the profits were realized by the venture prior to the close of 1921 (there being no profits in 1922), a partial division of the assets then occurred, and final division took place the following year. The two cases are so closely analogous that the Dickey decision is clearly applicable. It is also accepted by the appellee here as an authority for the principle involved (Volume XI-1 of the Internal Revenue Cumulative Bulletins, page 15).

In *Frank G. Wild v. Commissioner*, 24 B. T. A. 691, a member of two real estate syndicates was held taxable upon his share of the net earnings thereof for the year or years when earned by the venture. In that case, the question was whether the members of the syndicates were taxable upon their shares of the *undistributed* portion of the annual earnings. The Commissioner of Internal Revenue (appellee here) contended that Wild was taxable upon his proportionate share of such syndicate income for the years when earned, and based his contention upon the ground that, otherwise, the syndicate members would have it in their power to postpone indefinitely the taxation of income. The taxpayer took the position that under the syndicate agreement undistributed earnings were not available to him as having been constructively received, and, therefore, did not constitute taxable income to him. The Board of Tax Appeals held with the Commissioner, saying in part as follows (p. 697):

“In our opinion the syndicate constituted a joint adventure; * * * and the net earnings of each syndicate are properly to be included as gross income to the members for the year or years when earned.”

Any rule that an owner of profits is not taxable thereon until such time as he chooses to segregate them from his business would constitute a most anomalous exception to the fundamental rule that owners of profits are taxable on them as derived, would provide an unusually simple and effective method of tax avoidance, and would hinder the Government in the collection of revenues. (See *Wild v. Commissioner* above, and cases below.)

Such a rule “would grant to the taxpayer a practically complete right of selection of the year in which income

would be reported, something not contemplated by the Revenue Acts." (Cf. *Loose, Extrx. v. Com'r.*, 15 B. T. A. 169, wherein such language was used respecting a question of constructive receipt.) It is unthinkable that any such rule has been laid down or will be countenanced by a reviewing court.

The Circuit Court of Appeals for the Tenth Circuit very emphatically refused to apply such a rule in *Newman v. Commissioner*, 41 F. (2d) 743. In that case it appears from a prior report (40 F. (2d) 225) that in 1920 Newman and certain associates owned a one-half interest in certain oil and gas properties. One King and one Wood purchased that half interest from Newman and his associates and paid the purchase price in stock of a corporation which owned the other half of the oil and gas property. In completing the transaction it was agreed by the three that none of them would sell the stock without the consent of the other two. In denial of the realization in 1920 of any taxable profit from the sale, Newman contended that the stock he received in 1920 did not then have a "fair market value" for the reason that he could not sell such stock in that year without violating his contract with the two buyers. The Court said in part as follows:

"Taxation is an intensely practical matter. Income taxes are levied upon the basis of an annual accounting period. Rates are based upon the needs of the government for revenue and are continually changing. Annual accounting periods must be adhered to and arbitrary shifting of income from one year to another must be prevented in order to enable Congress to successfully adjust the rates to the needs of the Government. These have become fixed requirements in federal revenue taxation. We are of the opinion that a taxpayer cannot legally avoid such requirements by the simple expedient of an agreement with friends or associates not to sell until all agree and thereby select to his own liking the year in which his tax liability shall arise."

Another Circuit Court of Appeals (4th) was just as emphatic in a similar situation, *Wright, et al. v. Commissioner*, 50 F. (2d) 727. That case also involved a sale and the question was whether a part of the consideration (preferred stock affected by a five year trust agreement) had a fair market value when received so as to permit the computation of profit. The Court said in part (pp. 729-730):

“The contention on behalf of the petitioners that the taxable profit accruing to them could not be ascertained until the end of the period fixed in the trust agreement of five years is not sound. Were such an agreement held to fix the date of the taxation of profits in a transaction of this kind the government would be at the mercy of the purchaser and seller in each contract of sale, and if the taxing date could be postponed for five years by such a contract between purchaser and seller, it could be postponed for twenty years. * * * And the government cannot, of necessity, in the collection of its taxes, be left to the mercy of agreements between individuals.”

Congress has in effect recently expressed its own view that the Revenue Acts require each member of a joint adventure to determine his annual share in the syndicate gains or losses and to make his return of his share of the annual gains and profits. In considering the Revenue Bill of 1932 (H. R. 10236), Congress took notice of the existence of “some confusion” over the requirements of the prior Acts. In the Report* on this bill by the Committee on Finance it was stated with reference to Section 1109 (which became Section 1111 of the Bill as finally enacted) as follows, page 59:

“Some confusion has existed over the requirements of the prior acts as to the time and manner of returning income from the operations of joint ventures, syndicates, pools, and similar organizations.

* Report No. 665 on H. R. 10236, 72d Congress, 1st Session, Senate Calendar No. 705.

If the syndicate was not an association, partnership, or trust within the meaning of the act there was no express requirement in the act or regulations for the filing of a syndicate return, and the sole responsibility of making returns of the annual gains and losses of the syndicate was placed upon the several members. Quite frequently, however, the members of such a syndicate overlooked the necessity of their making returns each year of their shares in the annual gains and losses from syndicate operations and assumed that they were required only to make returns of their shares in the ultimate gain or loss from the entire syndicate operations in the year when the syndicate was wound up or liquidated. Moreover, a strict observance of the letter of the prior acts would have required each member to determine his annual share in the syndicate gains or losses upon the basis of his own accounting period and according to his own method of accounting, irrespective of the accounting period or method of accounting upon which the books or records of the syndicate were kept.

The bill does away with this uncertainty by placing all joint ventures, syndicates, pools, and similar organizations, which do not constitute associations or trusts, in the category of partnerships, and the members of such syndicates, pools, etc., in the category of partners. This provision will have the effect of requiring the syndicate to file a partnership return and will thus make it easier for the members to determine the distributive shares in the syndicate gains and losses which are to be included in their own returns."

The provision under consideration which was enacted (Sec. 1111 (a) (3), Public—No. 154—72d Congress) is as follows:

"The term 'partnership' includes a syndicate, group, pool, joint venture, or other incorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this Act, a trust or estate or a corporation; and the term 'partner' includes a member in such a syndicate, group, pool, joint venture, or organization."

In the prior Acts, including the Revenue Act of 1921, which governs here, the term "partnership" is not defined.

The significant circumstance is that Congress did not deem it necessary in the Act of 1932 to make any change in the provision quoted by the Board in this case. As Section 181 of the new revenue Act it is exactly the same as Section 218 of the Revenue Act of 1921:

"Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity."

It is therefore clear that this provision has not the significance in this case given to it by the Board of Tax Appeals. Under the Revenue Act of 1921, as well as under the Revenue Act of 1932, members of joint ventures are regarded by Congress as being taxable upon their distributive shares just like individual members of partnerships.

Under the circumstances of this case, the time of actual "receipt" is therefore unimportant.

"Actual receipt is nowhere used in the statute to limit the faculty upon which the tax is levied, and the word 'derived' which is found in the statutes and decisions clearly carries a broader connotation."

Lansill, et al. v. Commissioner, 17 B. T. A. 413.

As co-owner of the real estate venture, or even as a co-proprietor of the profits therefrom, Selling must be regarded as having derived his share of the profits as they were produced in the business. Since the profits were produced prior to 1922, they were not derived and are not taxable for that year.

(3) Even if Selling Was an Employee, His Share of the Profits of the Venture Was Received by Him Prior to the Year 1922.

The Board held that Selling's share of the profits which was separated from the venture in 1922 was then taxable because the profits, so the Board decided, was compensation then received as an employee. Not only is this decision, as we have shown, incorrect in law because Selling was a co-owner and not an employee, in which event it would be immaterial when the profits were distributed or were available, but this decision is also erroneous in law, even assuming that Selling was an employee and not a co-owner, because the effective "receipt" of the profits, as recognized under the income tax law, occurred prior to 1922.

The original contract expired by its own terms on the first day of January, 1921. It was then extended for one year by the parties, for reasons not appearing in evidence.

On January 1, 1921, either party became entitled to the distribution of the assets of the business in accordance with the terms of the contract. Whatever effect is to be given to the agreement that no distribution of profits should be made before January 1, 1921, it is clear that after that date the parties were entitled to demand of each other the distribution of profits which was to be made by the division of the assets. Therefore, even if Selling was a mere employee, with no ownership of the profits prior to the time of distribution, he did become entitled to the distribution a whole year prior to 1922. As an employee, it was in 1921 that his rights to these profits developed into the right to demand and obtain the actual possession of them. Under the income tax law, that amounted to "receipt" of the profits.

Since it is admitted that there was a profit, which was necessarily represented by the assets to be divided, there can be no question of ability to pay. Neither can there be any question of the ability of Selling to enforce his rights to a division of assets in 1921, since he had power to draw checks against money in the bank, had power to convey the real estate, and was in a position to compel the division of assets. Nothing but his own act, in consenting to a postponement of the distribution, prevented the actual division of the assets in 1921 or postponed his separate ownership, possession and enjoyment of his share of the profits.

It was in this situation that the parties, although making a partial division, voluntarily extended the agreement and postponed the final division of the assets. Not only does such an extension, by mutual agreement, of itself amount to a recognition of the right of either party to have demanded and obtained the division of assets pursuant to the contract, but such rights were further recognized by an actual division of a part of the assets made prior to 1922.

It was on January 1, 1921, that Selling took a lease as a distribution of \$9,000 of the profits to which he was entitled. The Board, while finding it as a fact, did not express any comment on the significance of this partial division of the assets. It is, however, an irrefutable demonstration of the fact, which the contract itself establishes, that in 1921 Selling was entitled to receive, and for income tax purposes had constructively received, the full amount of his share of the profits earned prior to January 1, 1921.

When the parties agreed to extend the contract, whether before or after January 1, 1921, they were in fact exercising that control and domination over the profits earned prior to that date which in law amounts

to the receipt and realization of the profits (if they had not previously been received and realized by the parties as co-owners). At least at that time, if not earlier, the profits had become subject to the income tax, and they can not properly be taxed in the later year.

Certainly if Selling was merely an employee, his voluntary act in postponing the division of assets to which he was entitled, and his voluntary relinquishment of his right to demand an immediate settlement, can not have the effect of postponing to a subsequent taxable year the claim for the income tax upon his share of the profits. It is equally true that if he was not a mere employee but was a co-owner of the venture, the profits became available to him in every sense during 1921, even if they had not already been constructively received by him during prior years.

In addition to the cases cited under the preceding point, holding that when the joint owners of income and profits agree to postpone the withdrawal or distribution of profits, their agreement can not postpone their tax liability, it has also been held that a similar rule governs the compensation of an employee. In the *Appeal of Brander*, 3 B. T. A. 231, on the question of constructive receipt of salary and commissions due from a corporation to one of its two sole owners but unpaid for reasons of his own, the Board said:

“This election to give the corporation the temporary use of the amount is an exercise by him of its enjoyment, and this is one of the primary attributes of income.”

Although the final division and distribution of assets was postponed for a year after the expiration of the contract, it was recognized that Selling was entitled to have received the distribution a year prior to the final division in 1922, since he was paid interest for that period. This was the construction by the parties of their

extension of the contract for the one-year period. It establishes beyond question that according to their own interpretation of their agreement, if the contract had not been extended Selling's right to the distribution would have been effective as of January 1, 1921, and that he was therefore entitled to claim interest from that date.

Therefore, although appellant contends that as a co-owner Selling received these profits from year to year as they were produced, it would follow that whether he was a co-owner or an employee he became entitled to the distribution of the profits during the year 1921. Consequently, whether a co-owner or an employee, his own act could not defer his tax liability upon such profits to 1922. Therefore they can not properly be taxed to him for the year 1922.

SUMMARY.

We submit that the contract between Selling and the corporation, when construed as a whole and in the light of the circumstances of its inception and of its interpretation by the parties in its performance, made him a co-owner of the business and of its profits. As a co-owner of the profits he was taxable thereon as they were derived by the business. Since all the profits were derived prior to the year 1922, none of them are taxable to him for the year 1922.

Whether or not the form of co-ownership was a legal co-partnership is immaterial for income tax purposes. The Board's failure to recognize this rule is fundamental to the resulting error of its decision. Co-owners of an enterprise, whether they are individuals or corporations, are subject to income tax on their share of the profits as they are derived even though not distributed until later (*Gallagher v. Com'r*, 2 B. T. A. 1057; *Dickey v. Com'r*,

14 B. T. A. 1296; *Ferry Market Company, Inc. v. Com'r*, 5 B. T. A. 167; *Wild v. Commissioner*, 24 B. T. A. 691).

But even if the contract, properly construed, did make Selling an employee and his share of the profits a "salary", nevertheless such profits must be deemed to have been derived by him prior to 1922 and therefore not taxable for 1922. The contrary interpretation, to the jeopardy of public revenues, would permit a taxpayer in similar circumstances to postpone his tax liability not merely five years or six years but any number of years. Such a situation is not countenanced by the courts (*Newman v. Commissioner*, 41 F. (2d) 743; *Wright, et al. v. Commissioner*, 50 F. (2d) 727).

CONCLUSION.

We submit that whether this court construes the contract to mean that Selling was a co-owner or was an employee, the sum of \$50,420.76 was not taxable as the income of the year 1922. Accordingly, the decision of the Board of Tax Appeals should be reversed and the cause remanded to the Board with direction to recompute the tax liability with this item eliminated.

Respectfully submitted,

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No. 5602

OCT 6 - 1932

Henry W. Hodges

In the Court of Appeals of the District of
Columbia

OCTOBER TERM, 1932

UNION GUARDIAN TRUST COMPANY, EXECUTOR OF THE
ESTATE OF JOSEPH L. SELLING, DEC'D, APPELLANT

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVE-
NUE, APPELLEE

APPEAL FROM THE BOARD OF TAX APPEALS

BRIEF FOR THE APPELLEE

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estate of Joseph L. Selling, dec'd, appellant

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVE-
nue, appellee

APPEAL FROM THE BOARD OF TAX APPEALS

BRIEF FOR THE APPELLEE

PREVIOUS OPINION

The only previous opinion is that of the United States Board of Tax Appeals (R. 9-17), reported in 22 B. T. A. 920.

JURISDICTION

This appeal involves income taxes for the year 1922 in the amount of \$6,161.59, and is taken from a decision (order of redetermination) of the United States Board of Tax Appeals entered September

24, 1931. (R. 23.) The appeal comes before this Court by petition for review filed September 25, 1931 (R. 24), pursuant to Sections 1001, 1002, and 1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109, 110, and in accordance with a stipulation of the parties filed September 25, 1931 (R. 23), pursuant to Section 1002 (d) of the Revenue Act of 1926.

QUESTION PRESENTED

Under a contract made in 1916 between the taxpayer and a real estate corporation the taxpayer undertook to manage a separate department of the corporation for a term of years in consideration of a percentage of the profits and also assumed liability for a proportion of any losses, settlement to be made upon conclusion of the contract. In accordance with its terms the contract was terminated in 1922, and pursuant thereto \$50,420.76 was distributed to the taxpayer as his share of the profits. Is the sum of \$50,420.76 so received by the taxpayer taxable income for the year 1922?

STATUTE INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227:

SEC. 212. (b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of account-

ing has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income. * * *

SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting per-

mitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; * * *.

STATEMENT OF FACTS

The facts are found by the Board of Tax Appeals and may be briefly stated as follows:

The taxpayer, a resident of Detroit, Michigan, prior to 1916, was engaged in the real-estate business on his own account. Early in that year the Straus Land Corporation, Limited, an Indiana corporation, began negotiations to associate the taxpayer with it in its city real-estate operations. As a result of these negotiations taxpayer and the corporation entered into a contract dated February 7, 1916. Under the contract the corporation organized a separate department styled the "City Real Estate Department" for the purchase, improvement, sale, leasing, and subleasing of real estate for business and residential purposes in the cities of the State of Michigan, and agreed to furnish an initial capital of \$100,000 for the operations of such department and to furnish such additional capital as might be required up to \$100,000. The initial capital was supplied without interest but any additional capital to be advanced was to draw interest at the rate of 6 per cent per annum. (R. 10-11.)

It was further provided that the corporation thereby employed the taxpayer, and the taxpayer thereby engaged his services to the corporation, for the management and conduct of the special depart-

ment of the corporation for a term beginning January 1, 1916, and ending January 1, 1921. The taxpayer agreed to devote his entire time and energies to the business of the department, except such time as might be necessary to manage the real estate then owned or controlled by the taxpayer. The taxpayer further agreed not to purchase any real estate for the department at a cost exceeding \$10,000 without the consent of two directors of the corporation, and that no leaseholds would be purchased without the consent of one director of the corporation, the minimum selling prices on all properties and leaseholds to be fixed by agreement between the parties and no reduction in such prices to be made without the consent of the taxpayer and one director of the corporation. It was provided that the taxpayer should be elected Vice President and Assistant Secretary of the corporation and that all deeds and instruments of conveyance must be signed by either the President or the Vice President and attested by the Secretary or an Assistant Secretary of the corporation. (R. 11-12.)

It was then provided that the taxpayer should receive, and he agreed to accept, in full as salary for all services and the corporation agreed to pay him from the net profits of the department as his salary, a sum equivalent to 50 per cent of the first \$10,000, 40 per cent of the second \$10,000, and 25 per cent of the third \$10,000, and 15 per cent of all over \$30,000 of the annual net profits earned by the de-

partment during the term of the contract, and that the taxpayer should be responsible for any losses during the term of the contract in the same proportions as provided for sharing in the net profits. The earnings and losses, if any, were to be adjusted and debited and credited to the taxpayer on the books of the department at the end of each year, but final settlement and payment to be made only at the termination of the contract. (R 12-13.) All notes, mortgages, contracts, and real estate acquired in the operation of the department were to be taken in the name of the corporation. It was further stipulated that no part of the net earnings of the department should be withdrawn by either party but should be left in the business without interest until the termination of the contract. Within 60 days after the termination of the contract or any extended term thereof the assets of the City Real Estate Department were to be applied first to the payment of all the liabilities incurred by the corporation on behalf of the department, except liabilities or notes secured by real estate and contracts for the purchase or sale of real estate. Of the excess the corporation was entitled to draw an amount sufficient to reimburse it for the initial \$100,000 capital advanced and any additional advancements made for the use of the department, together with 6 per cent interest on such additional advancements, and also for any other liabilities incurred on behalf of the department. Of the balance

of the assets, which it was provided should represent the net profits of the department, the taxpayer was entitled to such portion as was equivalent in value to his share of the net profits less his share of the losses, if any. The balance of such assets remained the property of the corporation. (R. 13-14.)

Under the contract all expenses of the City Real Estate Department during the term were to be borne by it and a proportionate share of the salary of any employee of the corporation performing services for the department were charged against it. The department maintained separate books of account and records of its contracts and business, distinct from those of the corporation not connected with the department. (R. 14.)

Upon execution of the contract the taxpayer organized the business of the department created thereby and carried it on as if it were his own business. Separate books and bank account were maintained independent of the general business of the corporation. As vice president and assistant secretary of the corporation the taxpayer, in the conduct of the business of the department, executed deeds and other necessary instruments and drew checks on its separate bank account. The profits of the business were determined at the end of each year and the taxpayer's share therein credited to him on the books of the department. The contract was extended for one year after January 1, 1921,

the original date fixed for its termination and was finally terminated in 1922. No profits were made during 1922. (R. 14-15.)

The taxpayer kept his books and made returns on the cash receipts and disbursements basis. (R. 15.)

The taxpayer received in 1921 as a part of his share of the profits a leasehold interest valued at \$9,000, which he reported in his income-tax return for that year as income. (R. 15.)

In 1922 the taxpayer received \$50,420.76 in cash, notes, and a mortgage, together with interest thereon from January 1, 1921, which amount represented the balance of his share in the profits of the department, pursuant to the terms of the contract. In his income-tax return for 1922 the taxpayer reported the sum so received as income from salaries, wages, commissions, etc., received from the Straus Land Corporation, Limited. Upon that return the taxpayer took a credit of \$6,161.59 for taxes paid the Canadian Government, which credit was disallowed by the Commissioner, resulting in the determination of a deficiency in the sum of \$6,161.59. (R. 15.)

The taxpayer appealed to the Board of Tax Appeals from the Commissioner's determination of a deficiency, contending that he was a partner or joint proprietor with the Straus Land Corporation and not an employee, and that the \$50,420.76 distributed to him in 1922 was not taxable income for that year but was income in prior years. The Com-

missioner's disallowance of the credit for taxes paid to the Canadian Government was not contested. (R. 3-4.) The Board of Tax Appeals held that the sum distributed to the taxpayer in 1922 as his share of the profits of the City Real-Estate Department was income received by him in that year and accordingly the Board approved the Commissioner's determination of a deficiency. (R. 17.)

While the appeal was pending before the Board the taxpayer died and upon suggestion of death the Board ordered that the appeal proceed in the name of the duly appointed executor of the estate of the deceased taxpayer and entered its order of redetermination of a deficiency against the estate of the deceased taxpayer in lieu of its prior order of March 27, 1931, redetermining the deficiency against the taxpayer. (R. 18-23.) From that decision the present appeal is taken.

SUMMARY OF ARGUMENT

The statute requires that all income shall be returned for taxation in the year in which it is received unless it is properly to be accounted for in some other period upon the accrual basis of accounting. In the instant case the taxpayer employed the cash receipts and disbursements basis of accounting in keeping books and reporting income.

Under a contract entered into in 1916 the taxpayer engaged his services to a real-estate corporation for the management and conduct of the business of a separate department set up by the corpo-

ration to deal in city real estate. It was agreed by the parties that the taxpayer should receive and would accept in full as salary for his services a percentage of the profits derived from the business of the separate department, such profits to be computed annually but no payment thereof to be made until the final termination of the agreement. The taxpayer also agreed to bear losses, if any, of the separate department in the same proportion as provided for the sharing of profits. The contract provided that upon the final termination the liabilities of the separate department should be paid, that all capital furnished by the corporation should be repaid, and that the balance of the assets should represent net profits. The term of the contract, originally from January 1, 1916, to January 1, 1921, was extended for one year. The agreement was finally terminated in 1922 and the net profits derived during the term of the agreement were ascertained and distributed in accordance therewith. In 1921 the taxpayer received \$9,000 on account of the profits to which he was entitled under the agreement. Upon final conclusion of the agreement in 1922 the taxpayer received \$50,420.76 as the balance of his share of the net profits.

The taxpayer was an employee of the corporation and not a joint adventurer with the corporation in the business carried on by the separate department provided for in the agreement. Under the contract the corporation supplied all the capital for the business, bore all the current expenses and liabilities,

and all property acquired in the operation of the business was taken in the name of and was owned solely by the corporation. All business was transacted in the name of the corporation. The taxpayer was not entitled to share in the current annual profits but was entitled only to a share of the net profits of the business at the termination of the agreement. The taxpayer was not a co-owner of the business nor of the profits thereof as profits. A share of the ultimate net profits of the business was to be paid to the taxpayer, upon the conclusion of the contract, as salary for services rendered during the full term. The contract was not terminated until 1922, at which time the taxpayer received his agreed share of the ultimate net profits from the business less the amount withdrawn by him in 1921. The sum withdrawn by the taxpayer in 1921 was merely by way of advancement on the share of profits to which he ultimately was entitled under the agreement. The \$50,420.76 paid to the taxpayer in 1922 as his share of the profits was salary for services rendered and was income received by him in that year and was taxable as such.

In any event, the appellant should not now be permitted to deny that the taxpayer received in 1922 taxable income in the amount of \$50,420.76. On his returns for 1916 to 1920, inclusive, the taxpayer did not report any portion of the profits of the business as income received by him in such years. On his return for the year 1921 the taxpayer reported the sum actually received from the

corporation as income. On his return for 1922 the taxpayer reported as income from salary the \$50,420.76 received in that year from the corporation. The taxpayer having represented upon his returns that no portion of the profits of the business had been received in any year prior to 1922 (except the small advance in 1921), and that his share of the profits was received in 1922 as salary, the appellant is now estopped to deny that the taxpayer received taxable income in the amount of \$50,420.76 in the year 1922.

ARGUMENT

The sum of \$50,420.76, distributed to the taxpayer in 1922, was received by him as salary for services rendered during the term of the contract and is taxable to him as income for that year. No part thereof was received or derived by the taxpayer prior to 1922

The appellant contends that the profits distributed to the taxpayer in 1922 were not income taxable in that year because such profits were received in prior years and were income for each preceding year to the extent earned in each year. It is argued that the taxpayer was a joint adventurer in the business carried on through the separate department of the corporation and that his share of the profits was derived or received annually as the profits were earned in the business. It is the position of the appellee that the taxpayer was an employee of the corporation, that under the contract he was entitled to a share only of the ultimate profits from the operation of the business during the full term as

salary or compensation for services, and that the profits distributed to him in 1922 were in payment for services and were income received and taxable in that year.

Attention is called at the outset to the requirement of the statute (Section 213 (a), *supra*) that all income shall be returned for taxation in the year in which received unless properly returnable in some other year upon the accrual basis of accounting. The taxpayer here was on the cash basis of accounting. It is not denied that the profits distributed to the taxpayer are taxable income. Nor can it be disputed that such income was received by the taxpayer in 1922 and is taxable for that year unless, as the appellant contends, the profits must be treated as received by the taxpayer, for income-tax purposes, each year as earned in the business.

Whether the taxpayer occupied the relation of joint adventurer in the business or was only an employee depends upon the intention of the parties, to be ascertained from their written contract construed as a whole and from the particular facts and circumstances of this case. Reported decisions of the relation subsisting upon other facts and circumstances are of scant benefit. 33 C. J. 844 (Section 9); *Franken-Karch Corporation v. Castriotis*, 186 N. Y. S. 344.

The courts have not undertaken to lay down any certain definition of joint adventure, nor need one be attempted for the purposes of this case. It is enough to determine whether the facts in this case

establish such a relation. It has been said that a joint adventure is for most purposes a partnership (*Duffin v. Lucas*, 55 F. (2d) 786, 793 (C. C. A. 6th)), the differences between the two relations being so slight that a joint adventure is often referred to as a kind of partnership and both are regarded as governed by the same rules of law. *In re Taub*, 4 F. (2d) 993, 994 (C. C. A. 2nd). The principal differences seem to be that courts of law will redress grievances between joint adventurers but not between partners, and a joint adventure is usually limited as to business undertaken, whereas a partnership is formed for carrying on a general business. 33 C. J. 841-842. Joint adventure is broadly referred to as a special combination of two or more persons, each contributing capital or service, in a specific business venture for the joint benefit and profit of all, and much the same definition, without the limitation to special combinations and specific ventures, is equally applicable to partnerships. Substantially the same tests are applied in determining whether the particular relationship is a partnership or a joint adventure as distinguished from other relations. *In re Taub, supra*. Although contribution of property or service and the sharing of profits and losses are common elements of a joint adventure, as they are of partnerships, the presence of either or both is not conclusive of the existence of the relation. Something more is necessary. There must be a community of

interest in the property and in the profits of the undertaking as profits. It is essential to the relation of joint adventure that there be a joint interest or proprietorship in the business and in the profits as profits when accrued. *Meehan v. Valentine*, 145 U. S. 611, 618. There can be no joint adventure, just as there can be no partnership, between persons associated in business—

where one of them is the sole owner of the property or capital employed therein, and of the increase or profits as they accrue, and so long as they are undivided. One is not a partner who has no proprietary interest in profits as profits. *Sugg v. Hopkins*, 11 F. (2d) 517, 519 (C. C. A., 5th).

We think it plain that the taxpayer possessed no interest as coproprietor in the business here involved and the profits thereof as profits.

The corporation organized a special department to deal in city real estate, with the taxpayer in charge as vice president and assistant secretary, and a separate set of books was carried to segregate this phase of the corporation's business from its general operations. The corporation furnished all the capital and bore all the expenses necessary to carry on the business of the separate department, which was conducted solely in the name of the corporation. All notes, mortgages, deeds, contracts, and real estate acquired were taken in the name of and were the property of the corporation.

Under the agreement the corporation agreed to and did employ the taxpayer, and the taxpayer agreed to and did engage his services to the corporation for the management and conduct of the separate business and further agreed to devote his entire time and energies to the conduct of that business "in a competent and efficient manner and to the best interests" of the corporation. As Vice President and Assistant Secretary the taxpayer had authority to execute instruments of conveyance on behalf of the corporation, but could not purchase parcels of real estate for the corporation at a cost exceeding \$10,000 each without the consent of two directors and could not purchase any realty leaseholds without the consent of one director. The taxpayer agreed to accept in full as salary for all his services, and the corporation agreed to pay him as salary a sum equivalent to stipulated percentages of the net profits of this separate branch of the corporation's business. The taxpayer further agreed to share the losses of the separate business upon the same basis as provided for the sharing of profits. The contract provided that the profits and losses should be computed annually, but profits could not be withdrawn until the termination of the contract. At the conclusion of the contract or any extended term thereof, it was provided that the assets should be first devoted to payment of liabilities and the return to the corporation of all capital. The remaining assets were declared to be net profits. The taxpayer was then entitled to with-

draw his share of such profits as agreed upon, after deducting his portion of any losses, and the balance of the assets representing net profits remained the property of the corporation. The term of the contract, originally for the period January 1, 1916, to January 1, 1921, was extended for one year. (R. 10-15.)

In the light of the plain language of this contract, we submit, it can not fairly be said that the taxpayer was a joint adventurer. The corporation was the sole owner of the business, it alone supplied the capital, and the title and ownership of all property acquired in the business was solely in the corporation. All the current earnings or profits throughout the term of the contract as extended were the sole property of the corporation, just as it alone was responsible for current expenses and liabilities incurred. The taxpayer had no interest in the profits as profits during the life of the contract, although they were computed annually for bookkeeping purposes. The taxpayer was interested only in the ultimate profits at the conclusion of the contract term and then only as a measure of the compensation to which he was entitled for the services rendered to the corporation. He was not entitled to a share of the annual profits. Under the contract he was entitled only to a share of the ultimate net profits realized from the operations of the business over the full term of the contract. Until the contract was terminated and there had been a balancing of profits and losses, the liabilities

of the business discharged, and the capital of the corporation returned, it could not be known what the profits, if any, would be, and consequently the taxpayer could have no proprietary interest in the profits as earned. The right of the taxpayer to a share of profits attached for the first time when the contract was concluded and the ultimate profits determined.

True, the taxpayer was entitled to participate in the distribution of ultimate net profits and agreed to bear a like proportion of the ultimate losses, if any, but these circumstances are not sufficient to constitute him a joint adventurer in the enterprise. The right to share in the ultimate profits of the business was no more than a convenient measure of the compensation to be paid the taxpayer for his services. *Berthold et al. v. Goldsmith*, 24 How. 536; *Fechteler v. Palm Bros. & Co.*, 133 Fed. 462 (C. C. A. 6th); *Klein v. Kirschbaum*, 240 Mich. 368. The assumption by the taxpayer of liability for a portion of the losses, if any, seems only reasonable in view of the broad powers conferred in the management of the business and the reciprocal right to share in ultimate profits. This provision of the contract undoubtedly was designed to induce greater care on his part in the management and conduct of the business. *Canton Bridge Co. v. City of Eaton Rapids*, 107 Mich. 613; *Sugg v. Hopkins*, *supra*. Without a proprietary interest in the business and in the profits as profits the taxpayer could

not be a joint adventurer. As stated in *London Assurance Co. v. Drennen*, 116 U. S. 461, 472:

Mere participation in profits would give no such interest contrary to the real intention of the parties. Persons can not be made to assume the relation of partners, as between themselves, when the purpose is that no partnership shall exist. There is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner with the others, or without his acquiring an interest in the property itself, so as to effect a change of title. * * *

The quoted language applies equally to joint adventurers and the relation of joint adventure as to partners and the partnership relation.

That there was no intention of creating a joint adventure between the taxpayer and the corporation, with the taxpayer possessing an interest in the business as co-owner, not only is plain from the terms of the contract, as we have pointed out, but also appears from the conduct and understanding of the taxpayer himself.

The statement of the taxpayer that because of the close friendly relation between him and the individuals controlling the corporation he would not have engaged in the business other than as a partner or coowner (R. 31) is of no material significance in view of the terms of the contract and the negotia-

tions leading to the agreement. At most the statement shows that the taxpayer was unwilling to enter the employ of the corporation in a capacity subordinate to the positions occupied by his friends. During the negotiations and discussions of the terms of the contract the taxpayer at first sought a general power of attorney to act for the corporation and finally agreed to accept appointment as an executive of the corporation with authority to act within certain limits. (R. 32-34.) His only apparent concern was that he would occupy an executive position in the corporation rather than a subordinate one. He was appointed an executive and clothed with limited authority to act for the corporation. There is nothing in these negotiations indicative of an intention that the taxpayer should be a joint adventurer in the enterprise, but on the contrary it seems that the taxpayer well understood he was being employed by the corporation for a special business undertaking of the corporation. Although appointed an executive, the taxpayer was none the less an employee of the corporation. The taxpayer, too, clearly understood that under the contract there could be no division of profits until the termination of the contract, and that he had no proprietary interest in profits as profits. (R. 51-52.) This understanding on the part of the taxpayer is further evidenced by the fact that in making his income-tax returns for the years covered by the contract no part of the current annual profits

of the business were treated as his income, except that in his returns for the years 1921 and 1922 he reported the amounts actually paid to and received by him. (R. 45-50.)

We think it clear, therefore, that the taxpayer was but an employee of the corporation and that his share of the ultimate profits which was paid to and received by him in 1922 in accordance with the contract was taxable income for 1922.

It is thought unnecessary to refer to and distinguish individually the several cases relied upon by appellant to establish that the taxpayer was a joint adventurer. In each of those cases the circumstances warranted the conclusion that there was a community of interest in the property and in the profits of the business as profits, and that the intention of the parties to the particular agreement involved to create a partnership was established. As we have attempted to show, there was no intention of the parties in this case to enter upon a joint adventure and the contract itself negatives the existence of any proprietary interest of the taxpayer in the business or profits as profits, an essential characteristic of joint ventures.

The further contention of the appellant that in any event the income in question was received by the taxpayer in 1921, for the reason that the original term of the contract expired January 1, 1921, and the taxpayer was then entitled to his share of the profits, can not, we submit, be supported. The

contract was not terminated in 1921, but was extended for one year beyond the original term. The original term was from January 1, 1916, to January 1, 1921, but clearly it was contemplated that the term might be extended. The profits were to be ascertained and distributed upon the final termination of the contract and not upon the conclusion of some intermediate period. It was the final termination of the contract which fixed the net profits of the business and the right of the taxpayer to share in the profits. The contract was finally terminated in 1922 and the assets representing the net profits were ascertained and distributed. The taxpayer then for the first time became entitled to his share of the net profits, and the mere fact that he was permitted to withdraw a small amount in 1921 in anticipation of his share of the ultimate net profits does not show that he was entitled to such profits prior to the termination of the contract and the actual receipt by him of the profits.

It is settled that income is derived and is taxable only in the year in which actually received or the right thereto definitely established. *North American Oil Consolidated v. Burnet*, 286 U. S. 417; *Lucas v. North Texas Lumber Co.*, 281 U. S. 11; *Commissioner v. Garber*, 50 F. (2d) 588 (C. C. A. 9th); *Commissioner v. Moore*, 48 F. (2d) 526 (C. C. A. 10th); *Rice, Barton & Fales v. Commissioner*, 41 F. (2d) 339 (C. C. A. 1st); cf. also *Kaufman Department Stores v. Commissioner*, 34 F. (2d) 257 (C. C. A.

3rd). The income-tax statutes are concerned only with *realized* gains, as with realized losses. *Burnet v. Logan*, 283 U. S. 404; *Lucas v. American Code Co.*, 280 U. S. 445. As was said in *Commissioner v. Darnell*, decided June 29, 1932, not yet reported but see C. C. H. 1932, Vol. III, pp. 9048, 9049-9050 (C. C. A. 6th):

* * * if income has neither actually been received during the taxable year, nor the right to its receipt been definitely fixed during that year, as to both the existence of an obligation on the part of the payor and the amount to be paid, such income is properly to be allocated only to that year in which it was in fact received or in which the right to receipt became fixed and liquidated.

The right of the taxpayer to the receipt of the stipulated share of the profits of the separate business of the corporation became definitely fixed for the first time in 1922 when the contract was finally terminated. These profits, actually received by the taxpayer in 1922, were taxable income for that year.

It should, moreover, be noted that, except for the small amount received in 1921 by way of advancement, the taxpayer did not report any portion of the profits of the separate business of the corporation as income for any of the years prior to 1922. On his return for the year 1922, however, he did report the profits actually received in that year as income from salaries, wages, commissions, etc. (R. 45-50.) It is plain from this that taxpayer

himself did not consider that he was a joint adventurer with the corporation, but on the contrary clearly understood that he was only an employee to whom a share of the profits was paid as salary or compensation for services. In any event, the taxpayer, through his sworn income-tax returns for the several years prior to 1922, represented that none of the profits of the business were received in those years (except in 1921 as noted), and through his return for 1922 represented that his full share of the profits was received in 1922 as compensation for services. The appellant, representing the deceased taxpayer, should not now be heard to deny the truth of those representations. The Commissioner accepted the returns as made by the taxpayer, and has determined and assessed the taxes due for the several years in reliance upon the information furnished. The Commissioner is now barred by the statute of limitations from determining, assessing, and collecting any additional taxes for the years prior to 1922, so that the profits received by the taxpayer will escape taxation should the appellant prevail on this appeal. The appellant, we submit, is estopped to deny that the profits in question were received by the taxpayer in 1922 and were income taxable in that year. *Commissioner v. Garber, supra*; *Commissioner v. Moore, supra*; *Commissioner v. Liberty Bank & Trust Co.*, 59 F. (2d) 320 (C. C. A. 6th); *Ralston Purina Co. v. United States*, 58 F. (2d) 1065 (Ct. Cls.).

CONCLUSION

We submit that the taxpayer was an employee of the corporation and not a joint adventurer, that the profits distributed in 1922 were received by him in that year as compensation for services and were income taxable in 1922, and that in any event the appellant is now estopped to deny that the profits distributed to the taxpayer in 1922 were income received and taxable in 1922. The decision of the Board of Tax Appeals is correct and should be affirmed.

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SEPTEMBER, 1932.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

IN THE

Court of Appeals of the District of Columbia

OCTOBER TERM, 1932

DEC 23 1932

Henry H. Hodges

CLERK

No. 5602

UNION GUARDIAN TRUST COMPANY, Executor of the
Estate of Joseph L. Selling, Deceased,
Appellant,

v.

DAVID BURNET, Commissioner of Internal Revenue,
Appellee.

ON PETITION TO REVIEW THE DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS.

REPLY BRIEF FOR APPELLANT.

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IN THE
**COURT OF APPEALS OF THE
DISTRICT OF COLUMBIA.**

OCTOBER TERM, 1932.

No. 5602

UNION GUARDIAN TRUST COMPANY, Executor of the
Estate of Joseph L. Selling, Deceased.
Appellant,

v.

DAVID BURNET, Commissioner of Internal Revenue,
Appellee.

ON PETITION TO REVIEW THE DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS.

REPLY BRIEF FOR APPELLANT.

In his brief, appellee raises for the first time a new defense. After a trial on the facts has been closed and after an appeal to this court has been effected by the other party, the appellee now contends that, because the taxpayer reported the income here in question as a salary in 1922, the appellant is now estopped to deny that such income was salary and to deny that it was taxable in 1922.

Even though raising this new issue of estoppel, appellee did not recite in his statement of the facts such evidence on this point as happens incidentally to be in the record, nor did he in his brief discuss nor anywhere refer to such facts.

Furthermore, because of the emphasis in his argument on certain facts recited in his statement, other facts in the record but not contained in his statement take on added significance and should therefore also be specifically stated for the consideration of the court.

A remarkable feature of appellee's brief is that, ignoring the authorities discussed by the appellant's brief, it presents a number of entirely new cases for the consideration of this court, cited mostly as authority for general principles of law and with never any interpretation of the facts in any cited case in comparison with the situation in the present case. Without even attempting to analyze and distinguish for the benefit of the court the cases cited and discussed in our brief, appellee disposes of them without any other reference or comment than that such cases, in the opinion of the appellee, are not pertinent. Consequently the court has before it two principal briefs, each founded upon an entirely different set of authorities. It would therefore seem incumbent upon appellant to assist further in the consideration of the problems in this case by discussing the authorities cited by appellee.

The foregoing circumstances make necessary this reply brief.

A. Important Facts Are Omitted by Appellee's Statement of Facts.

Because the rules of this court did not seem to require or permit of a statement of all the facts in the record, the appellant did not incorporate one in its brief, but

merely summarized such facts as would indicate to the court the nature of the problem. The appellee has, however, in his brief included an extensive statement of facts. In the main and as far as it goes, this statement is a fair one, but there are important facts in the record which are not recited in that statement, as follows:

When the contract between the Straus Land Corporation, Limited, and the taxpayer was being negotiated, that corporation was in the business of buying and selling farm lands and desired to go into the city real estate business if the taxpayer, who was familiar with city real estate, came with that company. (R. 30.)

The taxpayer did not wish to go into the venture as an employee, because of the friendly relationship existing between him and the three owners of the corporation, two of whom were his relatives and the other an intimate friend, and he would not have gone into the venture except as a partner or a co-owner. Prior to the execution of the contract he expressed his position in his letter of February 4, 1916. He intended and believed that the contract provided for his participation as a partner or co-owner. (R. 31, 34, 43.)

The taxpayer did most of the business for the City Real Estate Department, he kept office hours as he thought best only, and he did not account to anybody for his time. (R. 43.)

Neither party withdrew any money from the business until the settlements in 1921 and 1922. (R. 43.)

It was under the following circumstances (R. 43) that there was incorporated into the contract the next to the last paragraph in division two of the contract, reading as follows:

“The said party of the second part shall be elected Vice President and Assistant Secretary of the Straus

Land Corporation, Limited, which office he will hold for the period of this contract. All deeds and instruments of conveyance must be signed by either the President or a Vice President and attested by the Secretary or an Assistant Secretary of the said first party."

During the course of the negotiations for a contract, the taxpayer had requested an irrevocable power of attorney to transact the business of the City Real Estate Department in order to have absolute power in it. The officers of the corporation refused to do it in that form but agreed that they would elect taxpayer Vice President and Assistant Secretary of the corporation for the purpose of accomplishing the same object. Taxpayer's request for the power of attorney was contained in his letter of February 4, 1916, and he also made the request verbally during the course of the negotiations. The portion of the letter that covers the request is:

"That the first party agrees that it will execute an irrevocable power of attorney to the second party, authorizing him to buy and sell real estate, execute and discharge real estate mortgages and land contracts, execute promissory notes and sign checks for the first party upon the bank account of the City Real Estate Department, said power of attorney to run during the life of this contract." (R. 43-44.)

At the end of each year, the City Real Estate Department took inventory, and determined and credited the share of the profits to each party on the books of account. (R. 52.)

For one of the years prior to 1921, the City Real Estate Department sustained a loss and taxpayer's share thereof was charged against his account. (R. 45.)

The taxpayer reported the sum of \$50,420.76 as "Salaries, Wages and Commissions," from the Straus Land

Corporation, Limited, in 1922, pursuant to a ruling of the Commissioner made in 1922, when the contract was submitted to him for construction, that under the contract he was an employee. (R. 50.) At that time (1922) the Commissioner was not barred by the statute of limitations from determining, assessing and collecting additional taxes, if any were due, for the prior years under any interpretation of the contract. (R. 46-49.)

B. Appellee Erroneously Contends that Joint Adventures Must be Proved by the Tests for Partnerships.

Appellee states on page 14 of his brief: "Substantially the same tests are applied in determining whether the particular relation is a partnership or a joint adventure as distinguished from other relations. *In re Taub, supra.*" We fail to find in the cited case any expression of such a rule of law. In that case the court said (p. 994), "The relationship once established, the legal *rights and obligations* of the several adventurers in respect of their enterprise are substantially those of partners." (Italics supplied.)

Therefore, appellee's statement (p. 14) that joint adventures and partnerships "are regarded as governed by the same rules of law", citing the same case, is not to be taken as meaning that the *tests* for determining both are substantially the same. Neither *Meehan v. Valentine*, 145 U. S. 611, 618, nor *Sugg v. Hopkins*, 11 F. (2d) 517, 519, cited on page 15 of his brief, is any authority as to the nature of tests for determining the existence of a joint adventure, since each one concerned the question whether a partnership existed in the particular case and contains no expressions regarding joint adventures.

While it is conceded that the two relationships are closely related, it does not necessarily follow that in order to establish the existence of a joint adventure all the technical tests for a partnership must be satisfied. After all the question here is not whether the City Real Estate Department was a partnership (as the Board erroneously assumed); the question is whether it was a joint adventure.

A joint adventure is sufficiently shown when it appears (*Bedell v. Commissioner*, 9 B. T.A. 220) that:

1. The profits are shared
and
2. There is also—
 - (a) Control over the subject matter of the adventure *or*
 - (b) A proprietary interest in the subject matter *or*
 - (c) A sharing of the risks and burdens incident to the transaction or transactions to be carried forward.

These are the tests also formulated in another modern (1927) case, *Atlas Realty Co. v. Galt*, 139 Atl. 285, which were submitted in our principal brief on page 8. It is entirely erroneous to import other tests from the law of partnership.

C. In Comparison With Appellee's Precedents, This Case is a Clear Instance of Joint Ownership.

Appellee avoids any discussion of the many analogous cases cited in appellant's brief, with the ingenuous admission (p. 21) that: "In each of those cases *the circum-*

*stances warranted the conclusion that there was a community of interest in the property and in the profits of the business as profits, * * *.*" It would seem that appellee should advise the court of any reasons why the nearly identical circumstances of this case fail to warrant and require a similar conclusion.

On the contrary, appellee does not advance a single decision as being a case with facts in any way comparable to those of this case. Those cases which he does mention are merely cited in support of general principles of law which he suggests are applicable to this particular case. He does not suggest that any of those cases involve facts which are at all like those here presented. But it is obvious that any rule of law laid down in a decision has authority and meaning only in the light of the facts which required solution. It will be helpful and perhaps interesting to examine some of the decisions cited, but not discussed, by appellee.

(1) Contribution of assets by one party does not preclude joint ownership of an enterprise and its profits.

When appellee states (p. 15) that the "corporation furnished all the capital" as an argument in support of his contention (p. 15) that "the taxpayer possessed no interest as a co-proprietor in the business" or in the profits as profits, and again (p. 17) that the corporation "alone furnished the capital" in support of his thesis (p. 17) that "it can not fairly be said that the taxpayer was a joint adventurer," he goes beyond his own definition of joint adventure given on page 14, where he states: "Joint adventure is broadly referred to as a special combination of two or more persons, each contributing capital or service" etc. Hence it is obvious that while one person may contribute all the property or capital employed in a busi-

ness association of two or more persons, the relationship may still be, as has often been decided, a co-partnership or a joint adventure.

That was the situation in *Franken-Karch Corporation v. Castriotis*, 186 N. Y. S. 344, cited by appellee at page 13. It appeared that the plaintiff corporation and the defendants had an agreement under which the corporation was to examine hides and skins received by defendants, to give advice as to the conditions governing the hide market and where the hides and skins might be most advantageously sold, and to make efforts of its own to dispose of such hides and skins; that in consideration thereof plaintiff was to have half the net profits; that no hides or skins would be sold by defendants without plaintiff's consent; that the arrangement was terminable at any time at the option of either party; and that at the end of each transaction the defendants would render an account thereof to the plaintiff and pay such sums as were due the plaintiff. The plaintiff corporation sued the defendants for an accounting as to several transactions alleged to have been completed under that agreement.

The Court said in part:

“It seems to me that the agreement was of the character of a joint venture, the subject-matter whereof was the interest of the parties in the profits as such. The plaintiff was to contribute his time and give the benefit of his experience in the matter of sales, and the defendants were to purchase the goods which were the subject of the sales. If there were no profits, then plaintiff would lose the time devoted to, and the expenses incurred in, the enterprise.”

It will be observed that the plaintiff corporation contributed no capital to the enterprise, that it only performed services for the enterprise, that its sole interest was in the profits of the enterprise, and that it was not responsible

for any losses. Nevertheless the enterprise was held to be a joint adventure.

Therefore, that one person may have contributed all the capital or property employed in any common enterprise, is not even a factor in disproof of a joint adventure.

(2) Selling had a proprietary interest in profits as profits.

On this question appellee (p. 14) cites *Sugg v. Hopkins*, *supra*. We have previously referred to this case, pointing out that since it did not involve any question of joint adventure nor contain any expressions on that relationship, it is not an authority on the tests to be applied in determining the existence of that relationship.

The case may be useful, however, as a decision upon the question of what constitutes a proprietary interest in profits as profits. Appellee nowhere discusses that difficult question; he merely states flatly (p. 15) that the taxpayer had no such interest, and this he reiterates from time to time (pp. 17, 18, 19) as if mere repetition is proof of the very contention that is in issue before this court.

In the *Sugg* case both parties to the association expressly disclaimed any intention to become partners in a venture of sheep grazing. The written contract specifically provided that the "sheep when purchased" with Sugg's money, "and all increase thereof, and the wool, shall be and become and remain the sole and absolute property" of Sugg, and that "when the same or any part thereof or the wool is sold, the proceeds shall be placed" in a bank to the credit of Sugg. Since any profit from the venture would necessarily be reflected in terms of market value in the growth of the sheep, their increase, and all wool taken therefrom, or in the cash derived from sale, and since Sugg alone and exclusively owned not only the original sheep but all the progeny thereof as well as all

wool taken therefrom, it is clear that it was intended that Sugg should similarly own the cash. The court therefore held that Ferguson had no proprietary interest in the profits as profits.

In the present case the situation is vastly different. The contract herein nowhere stipulates that the assets of the business shall be the absolute property of the corporate member. It does say that all real estate purchased shall be taken in the name of the corporate member, but that provision would not necessarily make it the sole and exclusive owner thereof. On the contrary, since such assets were distributable in kind, its beneficial interest as proprietor was limited to the extent of its capital contribution and its share of the profits. The taxpayer necessarily had a beneficial interest in the same assets to the extent of his share of the profits.

Again assuming one of the major points at issue, appellee states (p. 17) that "the taxpayer had no interest in the profits as profits during the life of the contract," and that the profits were the property of the corporation. Appellee fails to point out, however, any particular in which there was the slightest difference between the interest of Selling and that of the corporation in the profits.

Appellee argues too much, in that all his assertions (p. 17) as to Selling's lack of any interest in the profits prior to the ultimate termination and division of assets would apply equally to deny that any interest in the profits belonged to the corporation, which appellee says was the sole owner. Neither could withdraw any portion thereof. Neither could terminate the interest of the other. In fact, Selling's interest was superior to that of the corporation to the extent that, after the repayment of the original capital, Selling had the first choice of the assets to be taken as his share of the profits and the corporation could

only take those assets which remained. Its share of the profits, therefore, were removed from the possession and control of the corporation longer and more effectually than in the case of Selling. How, then, can it be inferred that the corporation owned any of the profits if Selling owned none?

Obviously, both parties owned similar interests. Someone owned these profits immediately after they were realized, and was then subject to the income tax which then accrued. If it was not Selling, neither was it the corporation, but of course it was both.

While *Fechteler v. Palm Bros. & Co.*, 133 F. 462, is cited by appellee in another connection (p. 18) it has value for its decision on the question of what constitutes a proprietary interest in profits as profits. In that case a written agreement provided in substance that each party thereto would sell and supply to the other party at cost such goods and stock as the other party might chose and order, and that at the end of each year each party was to pay to the other party a stipulated percentage of the entire *gross profits* made and realized during the entire year. The court held that the contract provided for no partnership, stating in part as follows (p. 471):

“The old cases drew a distinction between net profits and gross profits. In discussing the kind of participation in profits which operated to create the relation of partners, it is said that:

‘The true meaning of the language “interest in profits, as profits,” seems to be that the party is to participate, indirectly at least, in the losses, as well as in the profits, or, in other words, that he is to share in the net profits, and not in the gross profits. If he is to share in the net profits, which supposes him to have a participation of profit and loss, that will constitute him a partner; if in the gross profits, then it will be otherwise.’ Story on Part., Secs. 34, 42 and cases cited.”

As the term "interest in profits as profits" is thus defined, Selling clearly had such an interest because he not only was to participate in the net profits but he was to share directly in the loss, and, furthermore, was liable for losses beyond his share of the net gains.

(3) Contrary to appellee's contention, the enterprise bore its own expenses.

Appellee also says, in support of his contention that the taxpayer had no proprietary interest in the business or in the profits, that the corporation not only furnished all the capital but also (p. 10) "bore all the current expenses and liabilities" and (p. 17) "alone was responsible for current expenses and liabilities incurred."

It is true that the corporation contributed the original capital, and perhaps made other advancements of working capital. But as has already been observed, in line with undisputed legal authority, the mere fact of contribution of capital to a business by one person only does not necessarily negative a co-partnership or other form of joint ownership of a business. If the other person or persons contribute only services to the common enterprise, such relationship may, and commonly does, exist.

When appellee says without support in any evidence that the corporation bore all the expenses of the enterprise, he is merely assuming that the enterprise was owned solely by the corporation, which is the very question at issue. The contract itself clearly means that the venture was to bear its own expenses, and the deficit, if any, was to be divided between the two parties. In clause nine of the contract (R. 39-40), it was provided that "there shall be charged to the City Real Estate Department as a part of its expenses to be deducted from its gross earn-

ings, for the purpose of determining its net profits, all its necessary operating and other expenses properly chargeable there against," including a portion of the salaries of officers and wages of employees of the corporation for such services as they devoted to the business.

Even the share of the profits to which the taxpayer was entitled, claimed by appellee to be a salary, was borne, not by the corporation, but by the enterprise through a division of its assets. Also, the enterprise was charged with interest on the capital contributed and the advancements made by the corporation. Appellee nowhere comments on this fact, but it should not be forgotten. It is incongruous to assert that the sole owner of a business charges himself with interest on the capital or "loans" placed in his own business.

(4) Despite appellee's contrary assertions, Selling had a proprietary interest in the assets.

Appellee further flatly states (pp. 11, 15, 17) that all the assets dealt in by the enterprise were the property of the corporation. This again is merely assuming a question at issue. It is true, of course, that the legal title to real estate and deeds and contracts were taken in the name of the corporation, but this fact does not even tend to prove that the corporation was the sole and exclusive owner thereof. Besides legal title the corporation also would have to have the exclusive and entire beneficial interest in such assets in order to be the exclusive and sole owner, whereas the contract itself provides the contrary. It had a beneficial interest only to the extent of its contribution and advancements and its share of the profits, while the taxpayer also had an interest in such assets to the extent of his share of the profits. The contract provides that these mutual interests could be satisfied by a

division of the assets in kind, and further (clause 8, R. 39) that:

“Such distribution, however, shall be subject to the privilege hereby given to the first party [the corporation] to purchase the pro rata interest of the second party [the taxpayer] * * *.”

If the assets were the property of the corporation, as appellee asserts, what was the need of that provision? Why was it deemed advisable by the corporation that it should have the privilege to *purchase* taxpayer's interest in the assets? Surely not because the corporation was the exclusive owner thereof, as appellee says, but because only by purchase could the corporation acquire exclusive ownership.

Not only does appellee assume the very fact at issue by repeated statements that the assets of the enterprise were the property of the corporation, but he does not limit this assertion to the property which formerly belonged to the corporation and which was contributed by it as the capital of the enterprise. He says (p. 11, and similarly at p. 17), that “all property *acquired in the operation of the business* was * * * owned solely by the corporation,” (p. 15) that properties acquired in the enterprise “were the property of the corporation,” and (p. 17) that “all the current earnings or profits * * * were the sole property of the corporation.” This, of course, directly contradicts the evidence that the corporation had no greater or different rights in or control over the current earnings and the assets in which they were invested, than did Selling. Neither could withdraw any of the profits before the end of the contract period and it was then necessary to make a selection of the particular assets to be taken in liquidation of the interest of each party.

Furthermore, since the venture continued over a period of five or six years and the profits were retained in the business for the same period, it is fair to assume that the profits, which were substantial, were not idle, but were also employed in the business. It would then follow conclusively, because the taxpayer had a share in the profits, that he also had capital employed in the business.

After giving a summary of the provisions of the contract (pp. 16-17), which is the second time that he does so (see pp. 4-7), appellee then (on p. 17) repeats the same assertion hereinabove discussed that the corporation was the sole and exclusive owner of the assets, in support of the same contention that the taxpayer was not a joint adventurer. Beyond the mere emphasis of repetition, the statement in this second instance has no more validity in the record than when previously made.

(5) Appellee fails to reconcile Selling's liability for losses even to extent of capital replacement, with appellee's denial of a joint proprietorship.

Appellee seems to assume (p. 18) that the legal significance and effect of Selling's responsibility for losses is in some way explained by the fact that it "seems only reasonable" and that it "undoubtedly was designed to induce greater care on his part," etc. Whatever the purposes and motives of either party, the fact remains that they did make this kind of a contract and the only question here is what legal relationship resulted from such a contract. Nothing in appellee's brief meets the proposition advanced by appellant, that sharing of losses, not merely as offsets to gains but even to the extent of replacing capital, is an almost conclusive indication of joint proprietorship.

Appellee quotes (p. 19) from the Supreme Court, in *London Assurance Co. v. Drennen*, a statement which deals solely with "mere participation in profits" and has no reference whatever to the vital element of responsibility for losses, which appellee has been purporting to discuss.

In *Berthold, et al., v. Goldsmith*, 24 Howard 536, the court considered the question whether or not a partnership or a general agency existed between a merchant and one Hook. It had been agreed between the two that Hook was to go to a distant city and make a practicable arrangement there with some responsible commission house to accept consignments of cigars from the merchant and to dispose of them on his account. They agreed that, if the project was successful, Hook should have half of the annual profits, with a guarantee from the merchant that his compensation should amount to \$1,800 per year. The court held that Hook was not a partner, saying in part (p. 544):

"But he [Hook] did not rely upon the profits for his compensation, for unless one-half of the profits exceeded \$1,800 he would neither be benefited nor injured by the success or failure of the enterprise except as the latter result might have a tendency to induce his employer to dispense with his services."

The *Berthold* case is, therefore, strikingly different from the one at bar. There the "employee" was to receive a stipulated annual stipend; here the taxpayer was to receive none. There the "employee" was to share in the net results of the venture only if it turned out to be successful; here the taxpayer was to share in the net results of the venture whether a success or a failure: if profitable, in the profits, if unprofitable, in the loss. The real question here, namely the significance of the sharing of losses, was therefore not at all involved in the cited case.

Klein v. Kirschbaum, 240 Mich. 368, did not involve a sharing of losses, and may be dismissed with a quotation giving in full the thought of the court (p. 372):

“Participation in profits, as between the parties, does not establish a partnership, but is only *prima facie* evidence of a partnership, and such inference may not be drawn if the profits were received as wages.”

Canton Bridge Co. v. City of Eaton Rapids, 107 Mich. 613, involved a contract which expressly stated that one of the parties, a bridge construction company, “appointed” the other party its “agent, to contract for bridges and general iron work, and to do any other work in connection with the general business when directed by the first party,” in certain specified territory. “In consideration of services rendered by said second party, said first party agrees to pay said second party one-half of all net profits on work contracted in said territory. * * * In case of loss on a job or contract, the same is to be divided equally between the parties to the contract.”

While the contract designated the inception of the association as an appointment and characterized the nature of the association by the term “agent” and specifically provided that the “agent” was subject “to be directed” by the party which appointed him, yet the case was a borderline one, as indicated by the close division of the court. Three of the five judges decided that the contract provided for an employment while the other two judges held that a partnership was created.

Sugg v. Hopkins is discussed above in another connection, and its second citation requires no further attention.

London Assurance Co. v. Drennan, 116 U. S. 461, involved an agreement under which a sum of money was paid

for the privilege of becoming a stockholder of a corporation thereafter to be formed. Clearly, therefore, the situation in that case was wholly different from the one here under consideration. Hence the quotation taken by the appellee from the opinion of the court is not a statement of principle necessarily applicable to the instant case. Furthermore, we do not contend that mere participation of profits in a business would give a proprietary interest in that business. The instant case is not one involving "mere participation in profits"; it involves a more significant fact, that is, participation in losses as well as in profits, besides other features of joint proprietorship which are pointed out in our principal brief.

(6) The intent of Selling to be a joint owner is plain.

Appellee seeks (p. 19-21) to minimize the significance of the position and authority of the taxpayer as a principal in the enterprise by suggesting in substance that he thereby merely served his pride. Naturally he was unwilling to enter any employment, especially under his friends. In addition, however, he was in business for himself in the very field of activities in which the enterprise was to be started and conducted. He was familiar with city real estate; the corporation was not, being then dealing in farm lands. To the corporation the proposed enterprise was a new venture; to the taxpayer it was familiar ground. He was also exposing a substantial capital to the risk of loss. The various expedients adopted to assure him sufficient control of the enterprise can not fairly be ascribed to mere pride; more reasonably they were due to the mutual desire to make him the actual operating head of an enterprise in a field where he alone of the associates was qualified and experienced.

Appellee (p. 20) imputes to the taxpayer an understanding that under the contract there could be no division of profits until the termination of the contract, and that he had no proprietary interest in profits as profits. A review of the record on these matters (R. 51-52) will not support any such imputation. The taxpayer testified plainly on cross-examination as well as on redirect examination that the profits for each year could be and were determined each year and that he believed it was better to await the final end of the contract before taking out any of those profits, the reason given being that if there had occurred any losses after prior profits had been distributed he would have had to pay such losses out of his pocket. Obviously under the contract as executed the profits were to be and were retained and accumulated in the business. But that fact is no evidence that the taxpayer understood that he had no proprietary interest in the profits as profits. Quite the contrary, for he said "I do not think any man with a salary would ever wait five years for his 'alleged' salary." (R. 51.)

Nor is there any particular significance (except as the cause of this law suit) in the failure of the taxpayer to report annually the current annual profits of the business. While the taxpayer apparently was a capable real estate man, there is nothing in the record to suggest that he was an expert in the law of partnership or in the law of income taxation. In the report to the Senate (quoted in appellant's brief, p. 26) it was pointed out that "quite frequently * * * the members of such a syndicate overlooked the necessity of their making returns each year," but it has never been suggested that this changed the law governing their liability. Nor has the Treasury Department been deterred by any such reason from asserting the tax upon the unreported income, as in the cases cited by appellant (pp. 21, 22, 24, 25, 26, 31). Thousands of taxpayers an-

nually make mistakes in their returns, not because they may not be qualified in their own particular field of income-producing activities, but because the income tax law is a technical and intricate field of special law. Even the word "receipt" has a technical meaning for income tax purposes, so it should not be surprising that the taxpayer did not fully comprehend that meaning. (R. 45, 52.)

D. Appellee Erroneously Contends That Physical Division or Segregation Was Necessary for Receipt of Profits.

Appellee fails to differentiate between the distributive share of the profits annually determined and the division, at the end of the contract period, of the profits accumulated since 1916. While it is true that the taxpayer, as well as the corporation, waited by mutual agreement until the end of the contract period to make physical division of the accumulation of annual profits of the enterprise, it does not follow that he did not share in the profits as annually derived. The profits were retained in the business and accumulated by mutual agreement, not, it must be presumed, as cash in a vault or at a bank, but to be used in the business. It obviously became further operating capital and at the end of the contract was reflected for the most part in assets other than cash. (R. 44.) Those assets were distributable in kind (contract clauses 7 and 8, R. 38-39) and were in part so distributed. (R. 44.) Therefore when appellee states (pp. 22-23) with reference to the facts in this record that the taxpayer was not in "receipt" of his share of the profits until the year 1922, the contention must relate only to the division of the assets of the enterprise.

While the final division of the assets occurred in 1922, no part of the distribution of assets then made reflected

any profits made during that year. There were no profits in that year. (R. 44.) Hence the distribution was a physical division of profits made during a period prior to the year 1922.

On the other hand, appellee also speaks of "receipt" in terms of realization (p. 23). Gain is "realized", according to the cases he cites, when an increase in value of a capital investment is converted into money or other property. See also *McLaughlin v. Alliance Insurance Co.*, 286 U. S. 244, 249. In this connection, the term "realized" is defined in Webster's New International Dictionary "to convert into actual money; as, to *realize* assets." The only time when gains were realized from sales of real estate in this case was at the time the sales were effected, which was all prior to the year 1922. Nevertheless appellee suggests that his cited cases, involving the time of realization of profits from sales of property, apply as well in support of his thesis that the taxpayer, as an employee rather than as a co-owner of an enterprise engaged in buying and selling real estate, received his share of the profits realized from such sales only when the contract was terminated by mutual arrangement.

If by mutual arrangement the contract had been extended 11 years instead of the one year, by appellee's argument the taxpayer would have been taxable in the year 1932 on his share of the profits realized annually over a period of five years prior to the year 1922. But in 1932 the taxpayer was dead and so the income could not have been taxed at all. The absurdity of the contention is irrefutable proof of its fallaciousness. The income tax is based on annual gains and profits. It is absurd to suggest that the tax on a profit may be postponed until the end of a lifetime in order to be sure if the net result of the transaction will be a gain or a loss. *Burnet v. Sanford & Brooks Company*, 282 U. S. 359.

It is equally absurd to suggest that by the mutual agreement of the parties to the enterprise the tax on profits realized thereon may be postponed for a lifetime or for any period beyond the time the profits are realized.

Appellee inaccurately states (p. 11) that "the contract was not terminated until 1922", ignoring the essential fact that a new contract was required and was made in 1921 to extend the existing arrangement. Again, it is argued (p. 22) that "clearly it was contemplated that the term might be extended", but there is no basis for assuming that any such extension could be accomplished without the free act and independent participation of the taxpayer. There is no escape from the conclusion that the taxpayer was entitled to and did exercise complete control and dominion over his share of the profits in 1921.

While *Duffin v. Lucas*, 55 F. (2d) 786, is cited by appellee in another connection (p. 14), the citation may also lead the court to consider some of the language of the opinion as bearing on the question of the time of receipt of income by members of a joint adventure. The remarks of the court on that point may be misleading unless viewed in the light of the facts of that case. That taxpayer contended that an exchange of stock of one corporation, previously acquired by a syndicate of which he was a member, for stock of another corporation as a part of a merger of the two corporations, was not a taxable transaction and that there would be no taxable income until the stock so received was sold. The first contention the court upheld and the second it denied, saying in part as follows (p. 792-3):

"As a general proposition, applicable in generally similar situations, this is not to be doubted; but in the nature and the closing of this syndicate deal, we find sufficient reason for exception to the general rule. True, for most purposes, such a syndicate or joint

adventure is a partnership, and the profits of the individual partners are received when the syndicate receives them; but we held in the Gwyn case that there was no taxable profit when the syndicate received this stock; and many times profits will not be beyond jeopardy until they are distributed to the syndicate members."

It thus appears that the court had previously held in another case (*Lincoln Bank, Gwyn's Executor, v. Commissioner*, 51 F. (2d) 78), that the exchange of stock for stock was not a taxable transaction and hence that neither the syndicate nor its members realized or received any taxable profit upon the exchange. The next transaction affecting the stock was its distribution *within the same taxable year* to the members upon winding up the syndicate. As to this latter transaction the court said: "If it then had a market value, we see no sufficient reason for not considering that transaction closed." In effect, the court held that while the bare exchange of stock for stock was not a taxable transaction, yet when the syndicate was wound up and if the stock then distributed had a fair market value, the *untaxed profit* involved in the exchange *became taxable*. This is by no means an authority for holding that where a profit is *taxable when realized*, the *tax should be postponed* until the date of distribution in a later year, merely because it was in the meantime held in joint ownership.

Neither decision, therefore, is any departure from the established rule of law, which appellee has not denied, that receipt of income (or if appellee prefers the phrase "realization of gain") by a joint adventure is receipt thereof by the members. *Reynolds v. McMurray* (C. C. A. 10th), 60 F. (2d) 843, and the decisions cited and discussed on pages 21-24 of our principal brief.

E. Appellee Should Be Denied His Defense of Estoppel.

For the first time in this proceeding and only after the appeal was taken by the taxpayer, the appellee argues that because the taxpayer did not report any portion of the profits as income for any of the years prior to 1922, except as to part in 1921, but instead reported said profits partly in 1921 and the balance in 1922, the appellant is now estopped to deny the correctness of those returns.

(1) This position is disclosed too late.

No intimation of such an issue was made by the pleadings upon which this case was tried, the evidence introduced, and the record closed in the court below. Consequently the record now before this court may not contain all the evidence which could have been introduced if the question had been raised in due time. It would seem therefore that appellee's contention now comes too late for the application of a doctrine which in itself is founded in equity and good conscience.

(2) The record does not support his plea.

Although this point was not at issue in the lower court, some facts do appear in the record, perhaps inadvertently, tending to show that the Commissioner as early as the year 1922 considered the very contract here involved and then took the position he still maintains that Selling was an employee and his share of the profits was salary. On cross-examination by the attorney for the appellee, the taxpayer testified (R. 50) that in 1922 he reported the sum now in dispute as a salary in accordance with the opinion of the Commissioner that the contract constituted him an employee and that his share of the profits from the venture was all taxable in 1922. In that year, when the Commis-

sioner took this action, there was still time for him to determine, assess, and collect whatever additional taxes, if any, were due for the prior years under any interpretation of the contract. The return for the year 1917 was filed April 1, 1918, (R. 46), and since the period of limitation was five years running from that date, the Commissioner was not barred in 1922 from assessing and collecting additional taxes, if any, for that taxable year, and would not have been barred until April 1, 1923, even without any waiver which could have extended the time for assessment and collection for as long as the two parties mutually desired. In 1922 the Commissioner had an even longer time for acting respecting the later years. So it is apparent that the Commissioner made his own decision as to the nature of the income and the time for reporting the same. He should not now be allowed to seek an advantage because the taxpayer was then induced to follow his advice.

Furthermore, insofar as the nature of the income involves a question of law, that is, whether the contract provided for employment or constituted the taxpayer a joint owner of the enterprise, no estoppel *in pais* could be applied even if the facts were different than they are above shown to have been. *Brooklyn City R. R. Co. v. Commissioner*, 27 B. T. A. In that case the taxpayer had made return for the year 1921 on the calendar year basis although it had regularly kept its books of account on a fiscal year basis. The Commissioner asserted a deficiency in tax for the calendar year 1921. The taxpayer contended that the determination was erroneous because made for a year other than its accounting year. After a hearing on the facts, the Commissioner for the first time contended that the taxpayer, having filed its return on the calendar year basis, was now estopped to deny that such

was not his taxable year. The Board, besides pointing out that the question of estoppel was not raised in the pleadings and so the taxpayer had had no hearing on the facts of that matter, said in part:

“Certainly the misconstruction of the law and action based upon a legal theory rather than upon a factual theory, would not constitute a false representation concerning a material fact.”

The decisions cited by appellee are based on different considerations. Both *Commissioner v. Moore*, 48 F. (2d) 526 (C. C. A. 10th) and *Commissioner v. Garber*, 50 F. (2d) 588 (C. C. A. 9th) involve the same sale of stock in an oil company for a consideration partly in cash and the balance in five annual installments. The taxpayers elected to report the profit upon the installment plan permitted by Treasury Regulations (Article 42 of Reg. 45), and maintained the correctness of that method during negotiations with the Commissioner, on other questions arising out of the same transaction, of such duration that the statute of limitations finally ran as to the year 1918, when the sale was effected. Then they contended that the profits should all have been taxed as income for the year 1918.

The Court of Appeals for the Tenth Circuit held that the taxpayers, having elected one of two methods prescribed by the Regulations, may not “change that election, particularly since the result would be to throw all the profit into a year where collection is barred by limitations.”

In the present case it is not suggested that the taxpayer had two permissible alternative courses of reporting the income from this enterprise, either one of which he could have elected to the final exclusion of the other. As a co-owner of the business the taxpayer was taxable upon his share of the profits as they were annually derived (see cases

cited and discussed on pages 21-24 of our principal brief) and neither the views of the Commissioner in 1922 nor of the taxpayer at any other time can change the law.

Commissioner v. Liberty Bank & Trust Co., 59 F. (2d) 320, cited by appellee, involved a representation as to a matter of fact, the taxpayer originally having reported that it had ascertained certain debts owing to it to be worthless in certain years. Clearly such a representation, which was on a matter of fact wholly within the peculiar knowledge of the taxpayer, and which was relied upon by the Commissioner, is entirely different from any made in this case where the mistake, if any, was on a question of law and was induced by a decision rendered by the Commissioner himself.

In *Ralston Purina Co. v. U. S.*, 58 F. (2d) 1065, likewise cited by the appellee, the taxpayer had by telegram induced the Commissioner to delay the collection of a tax then in progress until the period of limitations had run. The court not only held that in equity and good conscience the taxpayer could not later base a claim against the Government on the bar of the statute which he had induced the Commissioner to let fall for his own benefit, but also construed the telegram as a promise on the part of the taxpayer to pay the tax in question.

Clearly none of the cases cited by appellee without discussion are pertinent to this case on the matter of estoppel. Here there was no election and hence no binding force in the action taken by the taxpayer as was the case in the *Moore* and *Garber* decisions; here there was no active step taken by the taxpayer to deflect the Commissioner's action until the statute of limitations had run, as in the *Ralston* case; and here there was no representation as to a matter of fact, as in the *Liberty Bank* case. On the contrary, there is evidence to the effect that within the period of limitation

the Commissioner was presented with a copy of the contract and rendered his own opinion as to his interpretation thereof. There was at most a mutual mistake upon a question of law, which this court is free as well as obligated to rectify. (*Brooklyn City Railroad Co., supra.*)

In any event, we submit that appellee's plea comes too late in the proceeding to be now considered by this court. But even if it should be deemed a timely defense, the evidence clearly shows that there were none of the elements of an estoppel.

CONCLUSION.

We therefore again earnestly submit that the sum of \$50,420.76 was not taxable as income in the year 1922 and that accordingly, the decision of the Board of Tax Appeals should be reversed and the cause remanded to the Board with direction to recompute the tax liability for the year 1922 with this item eliminated.

Respectfully submitted,

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